

Report says connection between FirstEnergy, Trump and bailout work

 [crainscleveland.com/energy/report-says-connection-between-firstenergy-trump-and-bailout-work](https://www.crainscleveland.com/energy/report-says-connection-between-firstenergy-trump-and-bailout-work)

October 11, 2024



Bloomberg

FirstEnergy gave heavily to Trump as former president worked for a federal bailout, report says

As it sought a massive, corrupt bailout in Ohio, Akron-based FirstEnergy also spent lavishly on Trump-aligned dark money groups and at hotels and golf courses owned by the former president, a new report said this week.

Trump and his aides wanted to provide a federal bailout for the company's coal and nuclear plants, but they hit a brick wall — first in the form of a regulator, and then by public opposition to corporate bailouts, the report said.

Done by the Energy and Policy Institute, the report is a deep dive into otherwise secret records that have been pried out as a result of prosecutions and litigation around the Ohio bailout scandal. Called one of the biggest bribery scandals in Ohio history, FirstEnergy funneled \$61 million through dark money groups to pass a \$1.3 billion ratepayer bailout through the state's gerrymandered legislature and then protect it from popular opposition.

Former Ohio House Speaker Larry Householder is serving a 20-year federal prison sentence as a consequence of his involvement, former state Republican Party Chair Matt Borges is serving five years and two others have pleaded guilty and await sentencing. Two others were charged and then died by suicide.

Former FirstEnergy CEO Chuck Jones and Vice President Michael Dowling face state felony charges related to their involvement in the scandal. Testimony during last year's federal trial in Cincinnati showed that the pair were desperate for a bailout anywhere they could get one.

FirstEnergy was heavily invested in coal and nuclear generation when the natural gas boom and the advent of cheap renewables made them uncompetitive. In other words, FirstEnergy's millionaire leaders had made poor business decisions, and they wanted to

escape the consequences.

So by 2016, the executives were seeking bailouts to prop up the plants so they could spin them — and their environmental liabilities — off.

Starting in 2015, FirstEnergy had already contributed \$1.25 million to the Cleveland Host Committee to support the 2016 Republican National Convention in that city.

Then, nine days after Trump became the party's nominee, FirstEnergy CEO Jones met on July 28, 2016 with Trump at Trump Tower. The two discussed electricity generation and how Trump could deliver on his "promise to save coal jobs," according to a letter the Energy and Policy Institute obtained.

Some time after, Jones met Trump at a Canton fundraiser where Jones "did explain to Mr. Trump that while I was working behind the scenes to help his campaign, because of a (regulatory proceeding) in Ohio I could not be out front and he completely understood that," Jones said in an email detailed in the report.

Trump's campaign didn't respond to questions for this story.

By late 2016, Jones and Dowling were courting Householder at World Series games in Cleveland. And after Trump's election, they flew the now-imprisoned former speaker to Washington, D.C. aboard FirstEnergy's corporate jet for Trump's January 2017 inauguration.

By April 2017, FirstEnergy had engaged Avenue Strategies — a lobbying firm founded by former Trump Campaign Manager Corey Lewandowski — to help it get "federal relief for nuclear and coal-fired plants," the Energy and Policy Institute report said. The following month, Lewandowski stepped away from the firm amid accusations that he was violating federal lobbying laws by not registering, Politico reported.

Lewandowski, who is again working for Trump, later denied that he lobbied on FirstEnergy's behalf.

On May 1, 2017, FirstEnergy started really putting money into its efforts, paying \$5 million to America First Policies, a 501(c)(4) dark money group founded and run by supporters of Trump. The company financed its bribes in Ohio by pumping tens of millions through such groups, which don't have to disclose their donors.

As Jones undertook his charm offensive, he used FirstEnergy money to enrich Trump personally. His expense reports show that on a July 2017 trip to Washington, D.C., Jones spent \$1,400 on drinks, another \$5,400 for dinner and \$900 for a room at the Trump International Hotel, as well as \$400 on caddie fees at the Trump National Golf Club.

And as he spread around the FirstEnergy largesse, Jones had broad interactions with Trump officials. They include Vice President Mike Pence, EPA Administrator Scott Pruitt, Chief of Staff Rick Dearborn, Chief Strategist Steven Bannon, White House Counsel Don McGahn, Energy and Environmental Policy Advisor Mike Catanzaro, and National Economic Council Director Gary Cohn and Deputy Director Jeremy Katz, according to documents assembled by the Energy and Policy Institute.

To save FirstEnergy's power-generating subsidiary from bankruptcy, then-Energy Secretary Rick Perry in September 2017 proposed to allow special subsidies for coal and nuclear plants.

The Federal Energy Regulatory Commission rejected the proposal in early 2018, saying allowing it would upend wholesale markets for electricity generation. In other words, the regulator said it would give unfair special treatment to FirstEnergy and other companies that missed the boat on fracking and renewables.

In June 2018, Trump ordered Perry to use a provision in the Defense Production Act to prop up coal and nuclear energy — a step that could cost as much as \$11 billion a year. That effort also collapsed as the (correct) public perception grew that both measures proposed by the Trump administration were corporate bailouts, the Energy and Policy Institute report said.

In 2018, Perry called on the states to bail out their own coal and nuclear plants.

Ohio did just that with the corrupt House Bill 6. Householder shepherded it through Ohio's gerrymandered legislature and Gov. Mike DeWine signed it immediately.

Prosecutors haven't accused them of wrongdoing, but DeWine, Lt. Gov. Jon Husted, Attorney General Dave Yost and Secretary of State Frank LaRose all played roles in the passage and protection of the billion-dollar bailout that they haven't fully explained.

For its part, FirstEnergy entered into a deferred prosecution agreement with the Justice Department, admitted wrongdoing and paid a \$230 million fine. It fired Jones and Dowling and now says it has new ethical standards.

However, a group of institutional investors suing the utility accuses it of trying to limit accountability to the two former top executives, Jones and Dowling.

FirstEnergy spokeswoman Jennifer Young was asked whether FirstEnergy thought it was proper to enrich Trump-aligned groups and Trump personally as it sought taxpayer bailouts from his administration. She was also asked whether it was proper for a regulated utility to — as Jones claimed — play political kingmaker for the ratepayers the utility serves.

“While we’re unable to respond to your specific questions due to ongoing litigation, it’s important to note that in early 2022, FirstEnergy Corp. adopted a new Political & Public Engagement Policy and Practice grounded in integrity and transparency to ensure principled political and public policy engagement by its Board of Directors, officers, employees, and those acting on the company’s behalf,” Young said in an email. “Positions we take will align with the company’s core values and responsibilities to shareholders and other stakeholders.”

She added, “Led by a reconstituted Board of Directors and executive team, FirstEnergy has taken significant steps to move the company forward and put past issues behind us. Today, FirstEnergy is a different, stronger company with a sound strategy, a highly effective compliance program and a companywide culture of ethics, integrity and accountability.”

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Fox Factory Leaders Sued Over Pandemic Boom, Bust in Bike Parts

By Martina Barash

- **COURT:** N.D. Ga.
- **TRACK DOCKET:** [No. 1:24-cv-04571](#) (Bloomberg Law subscription)

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Fox Factory Leaders Sued Over Pandemic Boom, Bust in Bike Parts

By Martina Barash 2024-10-10T17:10:22000-04:00

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Fox Factory Holding Corp.'s board members and top executives misleadingly touted strong demand for bicycle suspension products throughout the Covid-19 pandemic until the part maker announced a 59% drop in sales in November 2023, an investor alleges.

The directors and officers knew the early-pandemic boom in demand for bicycles was temporary and that bike makers were overstocked with Fox shock absorbers, forks, and other products, Daniel Bardos says on behalf of the company. The leaders' failure to disclose lower consumer demand and the accumulating inventory harmed the company, Bardo says in his derivative complaint filed Wednesday in the US District Court for the Northern District of Georgia.

The case is among numerous others alleging companies portrayed early- and mid-pandemic growth as sustainable, only to report lower growth or revenue when the wave subsided. Sales of pool supplies, barbecue equipment, tools, and entertainment subscriptions all allegedly rose with consumers' changed lifestyles and subsequently fell, leaving investors with losses.

The damage to Fox includes having to defend and potentially settle a proposed investor class action over the inventory and sales issues, a loss of market capitalization, and impaired borrowing capacity, Bardos says.

Bardos seeks damages and equitable relief on his claims of breach of fiduciary duties, securities fraud, contribution, proxy misstatements, and unjust enrichment.

Fox didn't immediately respond to a request for comment sent through its web portal.

Bragar Eigel & Squire PC represents Bardos.

The case is Bardos v. Dennison , N.D. Ga., No. 1:24-cv-04571, complaint 10/9/24 .

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UPS Hit With Investor Class Action Suit Over Growth Projections

By Mike Vilensky

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UPS Hit With Investor Class Action Suit Over Growth Projections

By Mike Vilensky 2024-10-10T16:56:58000-04:00

- **COURT:** N.D. Ga.
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UPS and its top executives are facing a proposed class action lawsuit from a shareholder saying the company misled investors about its financial health.

CEO Carol Tome gave bullish statements to investors about the company's future growth while concealing concerns about its operating margins, the complaint claims.

United Parcel Service stockholder Lesley Savage filed the lawsuit Thursday in the US District Court for the Northern District of Georgia. Savage proposed a class of investors who acquired UPS securities between Jan. 30, 2024 and July 22, 2024.

During that time period, the shipping company's top brass said in a press release, earnings call, and investor presentation that it expected increased profits as the year progressed, the complaint says. The statements and omissions led Savage to purchase UPS securities at artificially inflated prices, the suit says.

In July, the company announced operating profit decreased 30% compared to 2023 and reduced its projections for the year, the complaint says. UPS stock price then tumbled some 12%, the complaint says.

The suit brings two counts of Exchange Act violations. Savage is seeking class certification, damages, attorneys' fees, and costs.

UPS declined to comment.

Judge Steven D. Grimberg is assigned to the case.

Holzer & Holzer LLC and Levi & Korsinsky LLP represent Savage and the proposed class.

The case is Savage v. United Parcel Serv., Inc. , N.D. Ga., Docket No. 1:24-cv-04591, complaint filed 10/10/24 .

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Shipping Company Disclosures Thwart Market Manipulation Suit

By Martina Barash

- Investors alleged secret agreement to bar risk to funder
- Notice of transactions meant no one was fooled, judge says

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Shipping Company Disclosures Thwart Market Manipulation Suit

By Martina Barash 2024-10-10T15:12:54000-04:00

- Investors alleged secret agreement to bar risk to funder
- Notice of transactions meant no one was fooled, judge says

DryShips Inc. investors can't proceed with a suit alleging a secret deal to inflate the Greek shipping company's stock price for the benefit of an investment fund because the relevant details were disclosed, a federal court ruled.

Investors were notified in advance of share purchase agreements and reverse stock splits, Judge Brian M. Cogan said for the US District Court for the Eastern District of New York. The US Court of Appeals for the Second Circuit's opinion affirming dismissal in a case involving the same investment fund and another distressed shipper is directly on point, Cogan said.

The plaintiffs' distrust of reverse stock splits "ignores the commercial reality under which these transactions occur," he said. "Such transactions can play a key role in salvaging troubled companies, even though they sometimes fail."

This case and the one decided by the Second Circuit, *Onel v. Top Ships, Inc.*, both stemmed from a downturn in the commodities-oriented dry-bulk shipping industry, according to the court. DryShips was in financial distress in 2015 and 2016 and turned to Kalani Investments Ltd. for financing, which the investors alleged involved a secret agreement to avoid risk to Kalani.

Under the purported agreement, DryShips would manipulate the price of its common stock so that Kalani could sell the shares it acquired at artificially inflated prices, the investors alleged in a proposed class action. They sued Kalani, its parent company Murchinson Ltd., and Murchinson's owner, Marc Bistricher, along with DryShips and two of its executives.

Cogan dismissed the latest version of the consolidated class complaint in the long-running suit, which he said had been handed from judge to judge amid judicial delays.

Reverse stock splits "can be seen as 'manipulative' in that they raise the price of the shares, at least on a book value basis, without changing the value of the company," he said in an opinion docketed Wednesday. "But, so long as the reason for the split is disclosed and investors have the option of voting against or selling before (or probably right after) the split, no one is being fooled."

"In the most frequent reverse split situation, investors know that the company is in deep, deep trouble and on the verge of being delisted, and the purpose of the reverse stock split is to buy time to get new financing or implement new business plans," the judge said. Investors can "make the choice of either bailing before the split or riding it out to see if the company's refinancing plan works."

Scott & Scott Attorneys at Law LLP represented the investors. Orrick, Herrington & Sutcliffe LLP; Seward & Kissel LLP; and Schulte Roth & Zabel LLP represented DryShips. Schulte Roth represented Kalani and related parties.

The case is *Silverberg v. DryShips, Inc.*, 2024 BL 359430, E.D.N.Y., No. 17-cv-4547, entered 10/9/24 .

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FTX Customer Claims Hedge Fund Cheated Him on Bankruptcy Gains

By Robert Burnson

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FTX Customer Claims Hedge Fund Cheated Him on Bankruptcy Gains

By Robert Burnson2024-10-10T23:18:43639-04:00

An FTX customer sued the hedge fund that bought his claim in the bankrupt cryptocurrency exchange, claiming that Olympus Peak underpaid him while it stands to make more than \$1 million from their deal.

Nikolas Gierczyk of California says Olympus Peak owes him a bigger payout after he sold his \$1.59 million claim last year to the hedge fund at a “substantial 42% discount” and FTX this year won approval of a bankruptcy reorganization plan that is expected to repay customers from 129% to as much as 146%.

Gierczyk claims he negotiated an explicit right to additional recovery in his agreement with Olympus Peak, but the fund refused to honor it, according to this complaint Thursday in federal court in Manhattan.

Rare among bankruptcy cases, FTX amassed billions of dollars more than it needed to cover what customers lost in the exchange's November 2022 collapse — thanks in large part to a bullish crypto market over the last year.

[Read More: FTX Has Billions More Than Needed to Pay Bankruptcy Victims](#)

Olympus Peak, based in Greenwich, Connecticut, didn't immediately respond outside regular business hours to a request for comment.

It's common for hedge funds to buy claims in distressed assets at a discount — offering claimants a quick payout, while the funds hold out for a more robust recovery in the bankruptcy process.

Gierczyk says that under his purchase agreement with Olympus Peak, the hedge fund promised to buy from him, at the same 42% rate he sold his claim, any excess distribution from the bankruptcy. “However, Olympus Peak made clear that they would not be fulfilling their end of the bargain,” his lawyers wrote.

The case is Gierczyk v. Olympus Peak Trade Claims Opportunities Fund I Non-ECI Master LP, 24-cv-07708, US District Court, Southern District of New York (Manhattan).

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NFT Investors Sue Gallery Over Metaverse, Cryptocurrency Scam

By Quinn Wilson

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NFT Investors Sue Gallery Over Metaverse, Cryptocurrency Scam

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An art gallery was accused of selling over \$13 million worth of non-fungible tokens showing anthropomorphized eagles in various outfits and costumes under the false pretense of providing access to a private club in the metaverse, according to a new investor lawsuit.

The proposed class of 36 plaintiffs says Eden Gallery Group Ltd., artist Gal Yosef, and others engaged in a “rug pull” by collecting millions from investors and doing nothing in return, according to the complaint filed Wednesday in the US District Court for the Southern District of New York.

“It is now clear that defendants made false and misleading statements and omissions designed to prop the value of Meta Eagle Club NFTs for their own benefit,” the plaintiffs said.

The suit alleges the defendants committed common law fraud, were unjustly enriched, and violated the New York business code.

According to the complaint, Eden Gallery announced it was going to start a private, members-only club in the metaverse based on Yosef’s digital art. The club was supposed to offer trips, giveaways, parties at Eden Galleries’ locations across the world, and access to more art in an online world called the “Galyverse,” as well as a developing a cryptocurrency token called \$WING.

To join the Meta Eagle Club, investors would use the cryptocurrency Ether to buy the NFTs created by Yosef, according to the complaint. The defendants sold 12,000 NFTs in February 2022, raising at least \$13 million.

A roadmap was published in 2022 about the perks of being a member of the club in an effort to entice potential investors, according to the plaintiffs. Those perks included activities like hot air balloon flights, private jet flights, helicopter flights, sky diving, and zero gravity flights.

But the purported perks never came to fruition as the defendants began to cite challenges in the NFT and cryptocurrency market, the proposed class says. The defendants would allegedly offer continual statements touting the club's development, longevity, and the long-term ecosystem of the Galyverse, and would offer assurances to the investors in an attempt to foster a sense of community.

The last "real update" on the Galyverse from the defendants came in July 2022, according to the complaint.

The defendants didn't have any experience or expertise related to blockchain, smart contract development and engineering, software development, or engineering at all, according to the complaint. The proposed class members say the defendants didn't make any "visible efforts" to follow through on the project after the mint of the NFTs.

"All told, the NFTs are now worthless," the plaintiffs said.

The defendants didn't immediately respond to a Thursday request for comment.

Wolf Popper LLP and Burwick Law PLLC represent the proposed class.

The case is Aamer v. Eden Gallery Group Ltd. , S.D.N.Y., No. 1:24-cv-07678, complaint filed 10/9/24 .

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Bottled water brought in after Legionella found at federal courthouse, daycare

 10news.com/news/local-news/bottled-water-brought-in-after-legionella-found-in-federal-courthouse-daycare

Austin Grabish

October 10, 2024



Photo by: Austin Grabish

Team 10 has learned Legionella was found in 13 out of 15 samples taken at the James M. Carter and Judith N. Keep U.S. Courthouse.



By: Austin Grabish

Posted 4:33 PM, Oct 10, 2024

and last updated 8:58 PM, Oct 10, 2024

SAN DIEGO, Calif. — Two federal buildings in downtown San Diego that house courthouses and a daycare recently tested positive for the Legionella bacteria.

The bacteria, which lives in water droplets and commonly grows in cooling towers, can cause Legionnaires' disease, a serious type of pneumonia the CDC says will kill about one in 10.

Team 10 has learned Legionella was found in 13 out of 15 samples taken at the James M. Carter and Judith N. Keep U.S. Courthouse.

Next door in the Edward J. Schwartz Federal Building and United States Courthouse, 24 out of 46 samples were positive for Legionella, Christi Chidester Votisek, a spokesperson for the U.S. General Services Administration, said.

The department, which oversees the management of the buildings, caught the Legionella as part of a proactive water quality management program.

Chidester Votisek said of the 24 fixtures at the federal building that tested positive, nine were in sinks at a daycare facility. She said since the testing, successful remediation has been done on the fixtures, eliminating high bacteria levels on all but four sites.

“Those fixtures will remain out of service until corrective actions are completed and re-testing clears them,” she said in an email Thursday.

Building management brought in bottled water for employees after discovering the Legionella and used a water quality management expert to perform chlorine level checks, disinfecting and flushing.

County data reviewed by Team 10 shows so far this year, 42 people have gotten ill after being exposed to Legionella.

Last year, several people died, including Benjamin Smith, a Santee plumber and father of three. His death came days before a beloved San Diego State professor passed away after getting sick.

There are no current public health investigations stemming from the water in the federal buildings, Chidester Votisek said.

She said test results are pending, so it's not yet clear if the remediation cleared the bacteria from the James M. Carter and Judith N. Keep U.S. Courthouse.

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TikTok knows its app is harming kids, new internal documents show : NPR

 [npr.org/2024/10/11/g-s1-27676/tiktok-redacted-documents-in-teen-safety-lawsuit-revealed](https://www.npr.org/2024/10/11/g-s1-27676/tiktok-redacted-documents-in-teen-safety-lawsuit-revealed)

Technology

States probed TikTok for years. Here are the documents the app tried to keep secret

October 11, 2024 5:30 AM ET

By

Bobby Allyn

,

Sylvia Goodman

,

Dara Kerr

Unredacted documents show TikTok is aware of the dangers caused by its app.

Sebastien Bozon/AFP via Getty Images

For the first time, internal TikTok communications have been made public that show a company unconcerned with the harms the app poses for American teenagers. This is despite its own research validating many child safety concerns.

The confidential material was part of a more than two-year investigation into TikTok by 14 attorneys general that led to state officials suing the company on Tuesday. The lawsuit alleges that TikTok was designed with the express intention of addicting young people to the app. The states argue the multi-billion-dollar company deceived the public about the risks.

In each of the separate lawsuits state regulators filed, dozens of internal communications, documents and research data were redacted — blacked-out from public view — since authorities entered into confidentiality agreements with TikTok.

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But in one of the lawsuits, filed by the Kentucky Attorney General's Office, the redactions were faulty. This was revealed when Kentucky Public Radio copied-and-pasted excerpts of the redacted material, bringing to light some 30 pages of documents that had been kept secret.

Technology

More than a dozen states sue TikTok, alleging it harms kids and is designed to addict them

After Kentucky Public Radio published excerpts of the redacted material, a state judge sealed the entire complaint following a request from the attorney general's office "to ensure that any settlement documents and related information, confidential commercial and trade secret information, and other protected information was not improperly disseminated," according to an emergency motion to seal the complaint filed on Wednesday by Kentucky officials.

NPR reviewed all the portions of the suit that were redacted, which highlight TikTok executives speaking candidly about a host of dangers for children on the wildly popular video app. The material, mostly summaries of internal studies and communications, show some remedial measures — like time-management tools — would have a negligible reduction in screen time. The company went ahead and decided to release and tout the features.

Separately, under a new law, TikTok has until January to divest from its Chinese parent company, ByteDance, or face a nationwide ban. TikTok is fighting the looming crackdown. Meanwhile, the new lawsuits from state authorities have cast scrutiny on the app and its ability to counter content that harms minors.

Business

TikTok fights for survival in latest filing as ban approaches

In a statement, TikTok spokesman Alex Haurek defended the company's child safety record and condemned the disclosure of once-public material that has now been sealed.

"It is highly irresponsible of NPR to publish information that is under a court seal," Haurek said. "Unfortunately, this complaint cherry-picks misleading quotes and takes outdated documents out of context to misrepresent our commitment to community safety."

He continued: "We have robust safeguards, which include proactively removing suspected underage users, and we have voluntarily launched safety features such as default screentime limits, family pairing, and privacy by default for minors under 16."

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Kentucky AG: TikTok users can become ‘addicted’ in 35 minutes

As TikTok’s 170 million U.S. users can attest, the platform’s hyper-personalized algorithm can be so engaging it becomes difficult to close the app. TikTok determined the precise amount of viewing it takes for someone to form a habit: 260 videos. After that, according to state investigators, a user “is likely to become addicted to the platform.”

In the previously redacted portion of the suit, Kentucky authorities say: “While this may seem substantial, TikTok videos can be as short as 8 seconds and are played for viewers in rapid-fire succession, automatically,” the investigators wrote. “Thus, in under 35 minutes, an average user is likely to become addicted to the platform.”

Another internal document found that the company was aware its many features designed to keep young people on the app led to a constant and irresistible urge to keep opening the app.

TikTok’s own research states that “compulsive usage correlates with a slew of negative mental health effects like loss of analytical skills, memory formation, contextual thinking, conversational depth, empathy, and increased anxiety,” according to the suit.

In addition, the documents show that TikTok was aware that “compulsive usage also interferes with essential personal responsibilities like sufficient sleep, work/school responsibilities, and connecting with loved ones.”

TikTok: Time-limit tool aimed at ‘improving public trust,’ not limiting app use

The unredacted documents show that TikTok employees were aware that too much time spent by teens on social media can be harmful to their mental health. The consensus among academics is that they recommend one hour or less of social media usage per day.

The app lets parents place time limits on their kids’ usage that range from 40 minutes to two hours per day. TikTok created a tool that set the default time prompt at 60 minutes per day.

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Internal documents show that TikTok measured the success of this tool by how it was “improving public trust in the TikTok platform via media coverage,” rather than how it reduced the time teens spent on the app.

After tests, TikTok found the tool had little impact – accounting for about a 1.5-minute drop in usage, with teens spending around 108.5 minutes per day beforehand to roughly 107 minutes with the tool. According to the attorney general’s complaint, TikTok did not revisit this

issue.

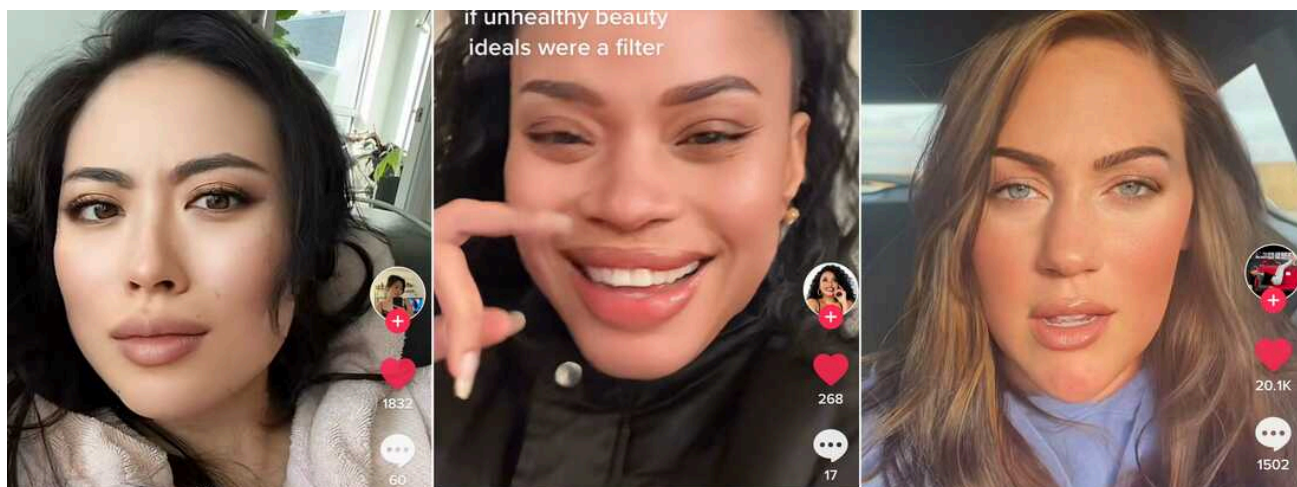
One document shows one TikTok project manager saying, “Our goal is not to reduce the time spent.” In a chat message echoing that sentiment, another employee said the goal is to “contribute to DAU [daily active users] and retention” of users.

TikTok has publicized its “break” videos, which are prompts to get users to stop endlessly scrolling and take a break. Internally, however, it appears the company didn’t think the videos amounted to much. One executive said that they are “useful in a good talking point” with policymakers, but “they’re not altogether effective.”

Document: TikTok demoted people it deemed unattractive on its feed

The multi-state litigation against TikTok highlighted the company’s beauty filters, which users can overlay on videos to make themselves look thinner and younger or to have fuller lips and bigger eyes.

One popular feature, known as the Bold Glamour filter, uses artificial intelligence to rework people’s faces to resemble models with high cheekbones and strong jawlines.



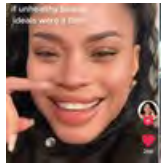
Internal documents show TikTok is aware of the harm that beauty filters, like Bold Glamour, can cause young users.

Image created by NPR's Grace Widyatmadja/TikTok

TikTok is aware of the harm these beauty filters can cause young users, the documents show.

Employees suggested internally the company “provide users with educational resources about image disorders” and create a campaign “to raise awareness on issues with low self esteem (caused by the excessive filter use and other issues).”

They also suggested adding a banner or video to the filters that included “an awareness statement about filters and the importance of positive body image/mental health.”



Technology

Does the 'Bold Glamour' filter push unrealistic beauty standards? TikTokkers think so

This comes as the documents showcase another hidden facet of TikTok’s algorithm: the app prioritizes beautiful people.

One internal report that analyzed TikTok’s main video feed saw “a high volume of ... not attractive subjects” were filling everyone’s app. In response, Kentucky investigators found that TikTok retooled its algorithm to amplify users the company viewed as beautiful.

“By changing the TikTok algorithm to show fewer ‘not attractive subjects’ in the For You feed, [TikTok] took active steps to promote a narrow beauty norm even though it could negatively impact their Young Users,” the Kentucky authorities wrote.

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TikTok exec: algorithm could deprive kids of opportunities like ‘looking at someone in the eyes’

Publicly, TikTok has stated that one of its “most important commitments is supporting the safety and well-being of teens.”

Yet internal documents paint a very different picture, citing statements from top company executives who appear well-aware of the harmful effects of the app without taking significant steps to address it.

One unnamed TikTok executive put it in stark terms, saying the reason kids watch TikTok is because of the power of the app’s algorithm, “but I think we need to be cognizant of what it might mean for other opportunities,” said the company executive. “And when I say other opportunities, I literally mean sleep, and eating, and moving around the room, and looking at someone in the eyes.”

TikTok's internal estimate: 95% of smartphone users under 17 use TikTok

TikTok views itself as being in an “arms race for attention,” according to a 2021 internal presentation.

And teenagers have been key to the app's early growth in the U.S., but another presentation shown to top company officials revealed that an estimated 95% of smartphone users under 17 use TikTok at least once a month. This led a company staffer to state that it had “hit a ceiling among young users.”

TikTok's own research concluded that kids were the most susceptible to being sucked into the app's infinitely flowing feed of videos. “As expected, across most engagement metrics, the younger the user, the better the performance,” according to a 2019 TikTok document.

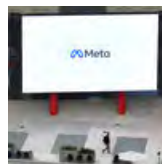
In response to growing national concern that excessive social media use can increase the risk of depression, anxiety and body-image issues among kids, TikTok has introduced time-management tools. These include notifications informing teens about how long they are spending on the app, parental oversight features and the ability to make the app inaccessible for some down time.

At the same time, however, TikTok knew how unlikely it was these tools would be effective, according to materials obtained by Kentucky investigators.

“Minors do not have executive function to control their screen time, while young adults do,” read a TikTok internal document.

TikTok pushes users into filter bubbles like ‘painhub’ and ‘sadnotes’

TikTok is well aware of “filter bubbles.” Internal documents show the company has defined them as when a user “encounters only information and opinions that conform to and reinforce their own beliefs, caused by algorithms that personalize an individual's online experience.”



Untangling Disinformation

New study shows just how Facebook's algorithm shapes conservative and liberal bubbles

The company knows the dangers of filter bubbles. During one internal safety presentation in 2020, employees warned the app “can serve potentially harmful content expeditiously.”

TikTok conducted internal experiments with test accounts to see how quickly they descend into negative filter bubbles.

“After following several ‘painhub’ and ‘sadnotes’ accounts, it took me 20 mins to drop into ‘negative’ filter bubble,” one employee wrote. “The intensive density of negative content makes me lower down mood and increase my sadness feelings though I am in a high spirit in my recent life.”

Another employee said, “there are a lot of videos mentioning suicide,” including one asking, “If you could kill yourself without hurting anybody would you?”

In another document, TikTok’s research found that content promoting eating disorders, often called “thinspiration,” is associated with issues such as body dissatisfaction, disordered eating, low self-esteem and depression

Despite these heeding, TikTok’s algorithm still puts users into filter bubbles. One internal document states that users are “placed into ‘filter bubbles’ after 30 minutes of use in one sitting.” The company wrote that having more human moderators to label content is possible, but “requires large human efforts.”

TikTok’s content moderation missing self-harm, eating disorder content

TikTok has several layers of content moderation to weed out videos that violate its Community Guidelines. Internal documents show that the first set of eyes aren’t always a person from the company’s Trust and Safety Team.

The first round typically uses artificial intelligence to flag pornographic, violent or political content. The following rounds use human moderators, but only if the video has a certain amount of views, according to the documents. These additional rounds often fail to take into account certain types of content or age specific rules.

According to TikTok’s own studies, the unredacted filing shows that some suicide and self-harm content escaped those first rounds of human moderation. The study points to self-harm videos that had more than 75,000 views before TikTok identified and removed them.

TikTok also has scattershot policies on content that includes disordered eating, drug use, dangerous driving, gore and violence. While TikTok's Community Guidelines prohibit much of this content, internal policy documents say the company "allows" the content. Often, the content is findable on TikTok and just not "recommended," meaning it doesn't show up in users' For You feeds or took a lower priority in the algorithm.

The company has talking points around its content moderation work. One example highlighted in the documents details a child sent to the emergency room after attempting a dangerous TikTok challenge. When dealing with the negative fallout from the press, TikTok told employees to use an internal list of talking points that said, "In line with our Community Guidelines, we do not allow content that depicts, promotes, normalizes, or glorifies [dangerous] behavior, including dangerous challenges."

TikTok acknowledges internally that it has substantial "leakage" rates of violating content that's not removed. Those leakage rates include: 35.71% of "Normalization of Pedophilia;" 33.33% of "Minor Sexual Solicitation;" 39.13% of "Minor Physical Abuse;" 30.36% of "leading minors off platform;" 50% of "Glorification of Minor Sexual Assault;" and "100% of "Fetishizing Minors."

TikTok slow to remove users under 13, despite company policy

Kids under 13 cannot open a standard TikTok account, but there is a "TikTok for Younger Users" service that the company says includes strict content guardrails.

It is a vulnerable group of users, since federal law dictates that social media sites like TikTok cannot collect data on children under 13 unless parents are notified about the personal information collected. And even then, social media apps must first obtain verifiable consent from a parent.

In August, the Department of Justice sued TikTok for violating the federal law protecting the data of kids under 13, alleging that the app "knowingly and repeatedly violated kids' privacy."

In the internal documents, however, company officials instructed TikTok moderators to use caution before removing accounts of users suspected to be under 13.

An internal document about "younger users/U13" says TikTok instructs its moderators to not take action on reports of underage users unless their account identifies them as under 13.

The previously-redacted portions of the suit suggest the company is aware these young users have accounts – through complaints from parents and teachers — but does little to remove them.

TikTok in crisis mode after report on TikTok Live being ‘strip club filled with 15-year-olds’

After a [2022 report](#) on Forbes about underage kids stripping on TikTok’s live feature, the company launched its own investigation.

That’s when TikTok officials realized there was “a high” number of underage streamers receiving digital currency on the app in the form of a “gift” or “coin” in exchange for stripping — real money converted into a digital currency often in the form of a plush toy or a flower.

TikTok discovered “a significant” number of adults direct messaging underage TikTokkers about stripping live on the platform.

As part of this internal probe, TikTok officials found that in just one month, 1 million “gifts” were sent to kids engaged in “transactional” behavior.

In an understated assessment, one TikTok official concluded: “[O]ne of our key discoveries during this project that has turned into a major challenge with Live business is that the content that gets the highest engagement may not be the content we want on our platform.”

New state laws could be key to TikTok filing decision

DJ [dailyjournal.com/articles/381385-new-state-laws-could-be-key-to-tiktok-filing-decision](https://www.dailyjournal.com/articles/381385-new-state-laws-could-be-key-to-tiktok-filing-decision)

Oct. 11, 2024

The decision by state attorneys general to file 14 separate cases against TikTok bucked the trend of filing a united case in federal court. A lack of federal legislation governing social media giants could be the reason why.

Why did 14 state attorneys general file 14 separate cases against TikTok instead of a single federal case?

The cases filed in 13 state courts and the District of Columbia went against a trend of dozens of states filing a single united case against a company they accuse of misdeeds, usually in a federal court. That's exactly what 33 states did last year in a case against another social media giant, Meta Platforms Inc.

But the TikTok cases could make sense against a backdrop of a variety of aggressive new state laws across the country restraining the power of social media companies -- and the relative lack of equivalent federal legislation.

"The 14 lawsuits filed are law enforcement actions brought by each state attorney general under each state's consumer protection laws," California Department of Justice spokesperson Elissa Perez explained in an email.

Attorney General Rob Bonta's office also confirmed the accuracy of a series of tweets by a Washington Post technology reporter. According to the thread posted on Wednesday, Bonta told the reporter that bringing an independent case requires "more resources" and that California's "very large ... 1,200 attorney" Department of Justice could provide those. Bonta also reportedly said there was a "lower barrier to entry to participate" in the Meta case.

According to a news release from Bonta's office, he and New York Attorney General Letitia James co-led the latest action. The new cases bring the number of states suing TikTok to 23. These include some of the biggest states -- and highest profile prosecutors -- in the country, including Illinois and Texas.

Knoxville, Tennessee based attorney Gregory P. Isaacs said the separate cases are more related than they might seem at first.

"Every state has a separate Consumer Protection Act, and there's a lot of similarities," said the founder and managing partner of The Isaacs Law Firm PLLC. "Attorneys general like Tennessee's have a very broad investigatory ability."

In fact, Isaacs said, the cases are largely an attempt to get information from TikTok about its policies and practices. These will then be shared among the states, especially if they show the company intentionally tried to hook children on its product. Isaac compared this to the litigation against tobacco companies during the 1990s, in which the states shared information they gained through discovery.

Isaac has been closely following -- and speaking in the media about -- TikTok and one of the main cases against it. That case was filed in the Chancery Court of Davidson County in Nashville. It has attracted amicus curiae briefs from across the country. This includes a 22-state brief filed the same day as the 14 new lawsuits asking the court "to permit the States' attorneys general to appear as amici and provide supplemental briefing to assist the Court in resolving Tennessee's action to enforce its requests for information." *In re: Investigation of TikTok Inc.*, 23-0298-IV (Tenn. Ch., Davidson Cnty. Mar. 6, 2023).

A plethora of consumer lawsuits has pressured social media companies over how they structure their services, particularly when used by children. A national poll from the Pew Research Center found that more than four in five adults favor parental permission before a child can create a social media account.

This could mean suing TikTok is a popular cause for Bonta to associate himself with -- especially if he makes a widely rumored run for governor in two years. Kamala Harris became vice president just four years after leaving the same job Bonta holds now.

Consumer attorneys say these cases now also might be less work than they could have been -- because private attorneys have done a lot of the work for them.

"Attorneys general all around the country are now taking a more active part in injunctive type cases that affect consumers," said Joseph W. Cotchett, founding partner of Cotchett Pitre & McCarthy LLP in Burlingame. "They see what's going on with corporate America. They see what's going on in Silicon Valley. Instead of just letting consumers file and get back \$0.32 or \$8 or \$10 for their grievances, they're going after the companies to make them change their ways."

He added, "They're also doing it because it puts their name out there as the consumer representative for their respective states."

Cotchett is one of the lead attorneys who sued TikTok and other social media companies last year, accusing them of creating a "mental health epidemic" and harming children's education. *San Mateo County Board of Education v. YouTube LLC*, 4:23-cv-01108, (N.D.

Cal., filed March 13, 2023).

That case is one of dozens filed by plaintiffs' attorneys against social media companies.

Mariana A. McConnell, a partner with Kiesel Law LLP in Beverly Hills, is involved in large ongoing cases against TikTok and other social media companies in the Northern District of California federal court and Los Angeles County Superior Court.

"Our liability cases in both jurisdictions are moving along very well and have laid the groundwork for cases across the country," she said in an email.

"The state AGs got a flying head start on structuring their cases due to the private lawsuits," Santa Clara University School of Law professor Eric Goldman responded in an email.

But deep-pocketed social media companies have allies.

"We provide robust safeguards, proactively remove suspected underage users, and have voluntarily launched safety features such as default screentime limits, family pairing, and privacy by default for minors under 16," TikTok spokesman Michael Hughes responded in an email. "We've endeavored to work with the Attorneys General for over two years, and it is incredibly disappointing they have taken this step rather than work with us on constructive solutions to industrywide challenges."

Hughes did not respond to a question about the additional difficulty and expense of fighting on so many legal fronts, nor on the issue of whether it might seek to consolidate any of the cases. Meanwhile, the company has support in the free speech community.

"The states' claims regarding features like autoplay and endless scrolling are really just a smokescreen for their distaste for First Amendment-protected content," said Aaron Mackey, Free Speech and Transparency Litigation Director at the Electronic Frontier Foundation. "We doubt the attorneys general would sue if TikTok presented an endless scroll of high school math problems or excerpts from classic literature. Parents and minors, not states, should decide when and how young people use TikTok."

#381385

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Court Advisory Committee Inches Forward on Transparency in Litigation Financing

 [law.com/nationallawjournal/2024/10/10/court-advisory-committee-inches-forward-on-transparency-in-litigation-financing](https://www.law.com/nationallawjournal/2024/10/10/court-advisory-committee-inches-forward-on-transparency-in-litigation-financing)

Jon Campisi

What You Need to Know

- The U.S. Supreme Court's Advisory Committee on Civil Rules addressed transparency in litigation funding during its meeting Thursday.
- The committee said it would look into creating a subcommittee to further look into claims that a failure to disclose funding sources creates impropriety.
- Most of the committee members said they would support further addressing the issue, since it first came to light a decade ago.

The U.S. Supreme Court's Advisory Committee on Civil Rules on Thursday addressed transparency in third-party litigation funding, proposing to create a subcommittee to further delve into the somewhat controversial issue.

Committee members, meeting in Washington, D.C., said they finally agreed to formally tackle the matter because of a strong call in the legal community—dating back about a decade—to create a federal civil rule requiring transparency into what outside groups are funding certain types of litigation. While the courts are proceeding slowly, groups representing big business, such as the U.S. Chamber of Commerce, have forcefully pushed for disclosure requirements, while third-party funders have defended the status quo.

"My view is that we have to take it on and study it and it probably deserves a careful look, if for no other reason than we don't know what we don't know," said U.S. District Judge David Proctor, who sits in the Northern District of Alabama and is a committee member. "I think the landscape is so drastically changing and the products are so widespread and different."

Earlier this month, more than 100 major companies spanning such industries as technology, pharmaceuticals and automotive sent a letter to the ACCR pushing for a national rule requiring full disclosure of third-party litigation funding.

U.S. District Judge Robin Rosenberg of the Southern District of Florida, who chairs the committee, called third-party litigation funding transparency "an important issue," and one that merits further study.

"I agree that it's not one that is going away," she said during the meeting. "It may be time to really focus all of our attention ... on that issue and monitor it and actively seek input from knowledgeable parties—lawyers, organizations, financing institutions, maybe a survey—so we can explore those avenues."

Another committee member called the issue a "theoretical problem," but one worth exploring further to see if real-world problems arise from the failure to disclose funding sources.

Proctor, who was asked to chair the new subcommittee that will address transparency, said it's somewhat unclear at this point whether, or to what extent, the issue is impacting litigation or possibly may in the future.

"We don't know enough yet," he said. "I think it would be good for transparency, since we've been asked to take this on for a while, that we commit to it and see what's there with an open mind and open eyes."

The issue of transparency in civil litigation financing has also caught the attention of federal lawmakers. In July, Rep. Darrell Issa, a Republican from California, introduced the Litigation Transparency Act of 2024.

The legislation would require disclosure of third-party litigation funding agreements in civil suits.

In a statement from his office, Issa said the proposal would target "serious abuses in our litigation system and achieve long-overdue transparency."

"If a third-party investor is financing a lawsuit in federal court, it should be disclosed at the onset of the case," he said in his statement issued this summer. "Awareness by all parties will help ensure fair and equal treatment by the justice system and deter bad actors from exploiting our courts."

Those who urge lawmakers and the courts to revise rules governing disclosure in litigation funding point to a number of problems with anonymous financing.

"Allowing outsiders to secretly use courtrooms as a trading floor incentivizes the filing of non-meritorious litigation," the U.S. Chamber of Commerce's Institute for Legal Reform says on its website.

The organization lauded the ACCR's decision in a statement provided to The American Lawyer on Thursday.

"We urge the federal judiciary to move forward swiftly in adopting mandatory disclosure requirements to get a peek behind the curtain of the implications that this secretive, multi-billion-dollar global industry has on our civil justice system," a spokesperson for the U.S.

Chamber said.

Third-party funders, however, say opponents are off-base, and that this type of funding structure merely helps corporate clients manage the costs and risk of pursuing redress against alleged harms that have occurred.

They also note that these types of agreements are nonrecourse, meaning if a plaintiff loses a lawsuit, the funder receives no compensation.

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Trending

Who Got The Work

Dechert partners Andrew J. Levander, Angela M. Liu and Neil A. Steiner have stepped in to defend Arbor Realty Trust and certain executives in a pending securities class action. The complaint, filed July 31 in New York Eastern District Court by Levi & Korsinsky, contends that the defendants concealed a 'toxic' mobile home portfolio, vastly overstated collateral in regards to the company's loans and failed to disclose an investigation of the company by the FBI. The case, assigned to U.S. District Judge Pamela K. Chen, is 1:24-cv-05347, Martin v. Arbor Realty Trust, Inc. et al.

[Read More](#)

Who Got The Work

Arthur G. Jakoby, Ryan Feeney and Maxim M.L. Nowak from Herrick Feinstein have stepped in to defend Charles Dilluvio and Seacor Capital in a pending securities lawsuit. The complaint, filed Sept. 30 in New York Southern District Court by the Securities and Exchange Commission, accuses the defendants of using consulting agreements, attorney opinion letters and other mechanisms to skirt regulations limiting stock sales by affiliate companies and allowing the defendants to unlawfully

US judicial panel to examine litigation finance disclosure

 [reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10](https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10)

Nate Raymond

REUTERS/Guadalupe Pardo Purchase Licensing Rights , opens new tab

Oct 10 (Reuters) - A federal judicial rules-making panel on Thursday agreed to study whether a nationwide rule requiring disclosure of third-party litigation funding in lawsuits is necessary at the urging of major companies, business groups and Republican lawmakers.

After a decade of weighing whether it should do anything to regulate the emerging field of litigation finance, the U.S. Judicial Conference's Advisory Committee on Civil Rules at a meeting in Washington, D.C., agreed to create a subcommittee to examine the issue.

"I agree it is an important issue, and I agree it's an issue that is not going away," said U.S. District Judge Robin Rosenberg, a Florida-based judge who chairs the committee.

The decision came a week after more than 100 major companies from the technology, pharmaceutical, automotive and other sectors signed a letter urging the judiciary to take action and require greater transparency into who is funding the cases being filed against them.

A few federal judges or courts, such as New Jersey's, already require disclosure of litigation funding, where a financier backs clients' cases in exchange for a cut of an eventual settlement or judgment, but there is no uniformity across the judiciary.

The companies that joined that letter included Amazon.com, Google, Cisco, Meta, Comcast, Exxon, Bayer, Ford, Pfizer and Novartis. Several Republican lawmakers including Senators John Cornyn of Texas and Thom Tillis of North Carolina had recently also written letters urging the judiciary to take action.

The creation of a subcommittee, which will be chaired by Chief U.S. District Judge R. David Proctor of the Northern District of Alabama, does not guarantee a rule will be issued in what is likely to be a years-long process.

But committee members said it was finally time they took a closer look at an issue that the U.S. Chamber of Commerce had first urged it take action on back in 2014, citing growth in the sector and the need to know if any problems are emerging.

Companies that finance U.S. commercial lawsuits in exchange for a cut of any recoveries committed \$2.7 billion to new deals last year, according to a recent report.

"We know what the theoretical problem is," said U.S. District Judge John Bates, who chairs the judiciary's top rule-making panel, the Committee on Rules of Practice and Procedure. "I think we have to look if there are actual problems."

Rosenberg said the subcommittee would seek input from lawyers, litigation funding industry participants, and others.

Page Faulk, senior vice president of legal reform initiatives at the U.S. Chamber of Commerce Institute for Legal Reform, in a statement welcomed the committee's decision.

"We urge the federal judiciary to move forward swiftly in adopting mandatory disclosure requirements to get a peek behind the curtain of the implications that this secretive, multi-billion-dollar global industry has on our civil justice system," Faulk said.

Business groups have argued that disclosures about financial backers in cases are necessary to allow defendants to make informed decisions about the course of litigation and understand who is making decisions about whether to settle lawsuits.

The International Legal Finance Association, a trade group representing the commercial funding industry, has argued that such a nationwide requirement is unnecessary and that it should be left to individual courts to determine the relevancy of any financing agreement to the merits of any particular case.

"We welcome the opportunity to be a part of the conversation to demonstrate how legal finance is a valuable part of the legal economy and has not resulted in any of the negative outcomes that the U.S. Chamber has cut from whole cloth," the group said in a statement.

Read more:

Louisiana law places new rules on litigation funders

Litigation funder Burford fights order denying bid to take over Sysco cases

US litigation funding in 'state of flux' as deal commitments dip, says report

Litigation funders deployed \$3.2 bln in U.S. investments last year - report

Reporting by Nate Raymond in Boston

Nate Raymond

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Bayer must pay \$78 million in latest Roundup cancer trial, jury finds

 [reuters.com/legal/bayer-must-pay-78-mln-latest-roundup-cancer-trial-jury-finds-2024-10-10](https://www.reuters.com/legal/bayer-must-pay-78-mln-latest-roundup-cancer-trial-jury-finds-2024-10-10)

Brendan Pierson

Item 1 of 2 Roundup is shown for sale in Encinitas, California, U.S., June 26, 2017.
REUTERS/Mike Blake/File Photo

[1/2]Roundup is shown for sale in Encinitas, California, U.S., June 26, 2017.
REUTERS/Mike Blake/File Photo [Purchase Licensing Rights](#) , opens new tab

Oct 10 (Reuters) - Bayer (BAYGn.DE) , opens new tab must pay \$78 million to a Pennsylvania man who said he got cancer from using the company's Roundup weedkiller, a state court jury in Philadelphia found on Thursday.

The verdict follows previous consecutive victories for Bayer in that court. The company had won 14 of the previous 20 trials over Roundup, though it has been hit with several massive verdicts in the litigation, including last November for \$1.56 billion, later reduced to \$611 million, and one in January for \$2.25 billion, later reduced to \$400 million.

Tom Kline and Jason Itkin, lawyers for plaintiff William Melissen and his wife, Margaret, said in a statement that Bayer had "acted with reckless indifference to people's safety."

The company "still has not gotten the message that it needs to change its ways," they said.

The jury awarded \$3 million in compensatory damages and \$75 million in punitive damages.

"We disagree with the jury's verdict, as it conflicts with the overwhelming weight of scientific evidence and the consensus of regulatory bodies and their scientific assessments worldwide," Bayer said in a statement.

The company said it believed it had a strong argument for reducing the punitive damages on appeal. The U.S. Supreme Court has ruled that punitive damages should generally be no more than nine times compensatory damages.

The Melissens sued Bayer in 2021. They alleged that William, like other Roundup plaintiffs, developed a form of non-Hodgkins lymphoma from exposure to glyphosate, which was the active ingredient in Roundup sold for home use until last year.

Melissen said he used the product at home and at work from 1992 until 2020, when he was diagnosed. He alleges that both glyphosate and another chemical in Roundup caused his cancer.

Bayer maintains that glyphosate does not cause cancer and that the lawsuits are meritless. It acquired Roundup as part of its \$63 billion purchase of agrochemical company Monsanto in 2018.

The German company settled most of the then-pending Roundup litigation in 2020 for \$10.9 billion, but currently faces about 58,000 claims, according to its most recent financial report.

Bayer won a significant legal victory in August, when the 3rd U.S. Circuit Court of Appeals in Philadelphia ruled that federal law shields Bayer from state law claims, which conflicts with previous rulings by other federal appeals courts.

Bayer has said it will seek to have the U.S. Supreme Court resolve that conflict, and that a victory there could effectively end the Roundup litigation.

Bayer had asked the Philadelphia state court to follow the 3rd Circuit and throw out the case. The 3rd Circuit's jurisdiction includes federal courts in Pennsylvania, but state courts are not legally bound to follow it. That bid was denied, allowing the Melissens' case to go to trial, but the company is appealing the denial.

Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi and Bill Berkrot

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J&J talc bankruptcy stays in Texas despite 'forum-shopping' opposition

 [reuters.com/legal/jj-talc-bankruptcy-stays-texas-despite-forum-shopping-opposition-2024-10-10](https://www.reuters.com/legal/jj-talc-bankruptcy-stays-texas-despite-forum-shopping-opposition-2024-10-10)

Dietrich Knauth

A Johnson & Johnson banner is displayed on the front of the New York Stock Exchange (NYSE) in New York City, in New York City, U.S., December 5, 2023. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Oct 10 (Reuters) - A Johnson & Johnson (JNJ.N) , opens new tab subsidiary can pursue its third attempt to resolve tens of thousands of lawsuits alleging its talc products caused cancer in a federal bankruptcy court in Texas, a judge ruled on Thursday, allowing the company to avoid a venue that shot down its two previous efforts.

U.S. Bankruptcy Judge Christopher Lopez at a hearing in Houston rejected arguments raised by the U.S. Department of Justice's Office of the U.S. Trustee, its bankruptcy watchdog, and attorneys representing some of the women suing the company who are opposed to the settlement.

They had argued that the case should be sent to a U.S. bankruptcy court in New Jersey, which oversaw and dismissed two previous bankruptcies meant to resolve the same talc lawsuits. But Lopez said J&J's latest effort should be treated as a new case, in part because J&J gathered votes in advance from claimants who support the settlement.

"I think this bankruptcy case is different," Lopez said.

New Jersey-headquartered J&J faces lawsuits from more than 62,000 plaintiffs alleging its baby powder and other talc products were contaminated with asbestos and caused ovarian and other cancers.

The company has said its products do not contain asbestos and do not cause cancer. It says bankruptcy is the best way to equitably compensate plaintiffs, who otherwise would wait years for their cases to be heard in a "lottery-like" tort system that often results in no recovery for plaintiffs.

Erik Haas, J&J's worldwide vice president of litigation, said Lopez's ruling would aid the company's settlement efforts.

"Today's decision is another step closer to full and final resolution of the talc litigation for the benefit of all stakeholders," Haas said.

J&J subsidiary Red River Talc filed for bankruptcy protection in Houston in September, seeking to take advantage of bankruptcy courts' ability to enforce global settlements that

permanently halt all related lawsuits and forbid new ones. It proposed a \$9 billion settlement to resolve claims by women who allege that they developed gynecological cancers after using J&J talc products.

Outside of bankruptcy, any settlement J&J reached with some claimants would still leave holdouts or future plaintiffs with the right to sue - and leave the company exposed to potential multibillion-dollar verdicts.

Opponents of the deal have said that J&J cannot be allowed to simply pick a new bankruptcy court to get around previous rulings that its subsidiary was not eligible for bankruptcy protection. A federal appeals court has ruled that neither the talc subsidiary nor J&J were in the type of "financial distress" that bankruptcy was meant to resolve, and it reiterated that ruling after J&J and its talc company filed for bankruptcy a second time.

If companies can seek out new bankruptcy courts to escape a ruling they don't like, the entire bankruptcy system is undermined, said Linda Richenderfer, an attorney for the U.S. Trustee, at the hearing.

Law firms opposed to the settlement pointed out that J&J's forum shopping has now led to three bankruptcies filed in three courts since 2021.

"If that isn't abusive forum shopping, I don't know what is," attorney Sunni Beville told Lopez on Thursday.

Bankruptcy reform advocate Cliff White said Lopez's decision highlights the need for new rules to prevent bankruptcy forum shopping. White, a former head of the U.S. Trustee program, said, "There are no rules anymore," after Lopez's decision.

The proposed bankruptcy settlement has deeply divided attorneys representing cancer victims. Some support the deal as the best way to get compensation for their clients, while others argue that the settlement value is too low and that wealthy companies like J&J should not be allowed to use the legal system to gain bankruptcy protections meant for people and companies that cannot afford to pay their debts.

Reporting by Dietrich Knauth; Editing by Alexia Garamfalvi, Leslie Adler and Bill Berkrot

J&J's Court-Shopping Win Highlights Irresistible Bankruptcy Tool

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X518HDTG000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X518HDTG000000)

- Company beats DOJ bid to move baby-powder case to New Jersey
- J&J talc bankruptcies had twice been stopped in New Jersey

Johnson & Johnson's successful use of a "court-shopping" legal tactic to advance its latest plan for resolving thousands of cancer claims spotlights a controversial bankruptcy maneuver corporations have long employed to avoid unfavorable rulings.

A federal bankruptcy judge in Texas said Thursday he'll keep a J&J subsidiary in his Houston courtroom, dismissing

the company improperly skirted a federal appeals court for New Jersey that has twice stopped the health-care giant's use of insolvency to settle mass lawsuits claiming its famous baby powder products caused cancer. The case is now set to proceed in a court far from the company's hometown, in a jurisdiction that's more likely to let J&J's plan go forward. Judges for decades have permitted the strategy, also known as

, to allow companies to select what they believe will be friendly bankruptcy courts thousands of miles from their headquarters. And while the ruling is a big step forward for J&J, to critics the tactics involved are a gross distortion of the legal system being used to shield a \$390 billion company with plenty of money to face legal claims.

"This is not how bankruptcy is supposed to work," Sunni P. Beville, a lawyer for women opposed to the deal said in court Thursday. "People see this as a manipulation of the bankruptcy system."

J&J is offering more than \$8 billion to settle the litigation, a

the company has said is supported by roughly 83% of the women who voted on it. The settlement is being offered through a corporate shell J&J created to absorb the cancer claims and file bankruptcy, a legal strategy known as the Texas Two Step.

'Strong Disagreements'

US Judge Christopher Lopez said J&J's new subsidiary, which was created in Texas to ferry cancer claims to bankruptcy, satisfied Chapter 11 requirements to keep the case in his courtroom. The question of whether J&J's settlement will be approved, or if opponents will succeed in stopping a third bankruptcy, will be left for later court hearings. Questions about whether J&J gained enough votes from women to approve the deal will also be decided later.

“There are certainly strong disagreements in this case,” Lopez said. “The case might ultimately get dismissed. A plan with potential overwhelming creditor support, if that’s what it ends up being, may also get confirmed.”

J&J has said its talc-based products are safe and lawsuits against the company lack merit. The company has said J&J’s new talc subsidiary, Red River Talc LLC, is incorporated in Texas, which is where its assets are located and where women who voted in support of the plan selected as the appropriate legal forum.

J&J’s talc unit “has the right to choose the venue that is the most favorable,” Red River lawyer Greg Gordon said during Thursday’s hearing.

“Today’s decision is another step closer to full and final resolution of the talc litigation for the benefit of all stakeholders,” J&J Worldwide Vice President of Litigation **Erik Haas** said following the ruling.

Move Disputed

The US Justice Department argued J&J’s maneuvers “are an assault on the very integrity of the bankruptcy system” and said the case should return to New Jersey, where the company is headquartered and the first two bankruptcies were thrown out.

Andy Birchfield, a lawyer for talc victims, also criticized the company’s tactic, saying it “abuses the bankruptcy system.”

“Going forward, we will provide evidence to the court illustrating many examples of deceit, deficiencies, and discrepancies of the vote administered by J&J and the precedent rulings against such a third-party liability release,” he said in an email.

J&J created a corporate shell to absorb the cancer claims and file for bankruptcy, only to have the US Third Circuit Court of Appeals throw the cases out. The appeals court said bankruptcies weren’t warranted because the units ultimately had the backing of its deep-pocketed parent.

Gordon acknowledged that the company intentionally avoided filing in New Jersey in order to avoid the Third Circuit. But they did that for a legitimate reason, Gordon said. The company’s bankruptcy settlement is overwhelmingly supported by claimants, Gordon said, citing the vote of alleged victims held before the latest insolvency case was filed.

When claimants voted they knew that the case would be in Texas, Gordon said.

The bankruptcy case is Red River Talc LLC, 24-90505, US Bankruptcy Court for the Southern District of Texas (Houston).

(Updates with comment from lawyer for talc victims in fourth paragraph, adds context in third paragraph.)

--With assistance from Jef Feeley.

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Beth Williams

Hurricane Milton Hits Disney Profits Proving ESG Isn't 'Woke Capitalism'

Published: Fri Oct 11 12:58:50 EDT 2024

By Beth Kowitt

(Bloomberg Opinion) --

A storm is coming.

Photographer: Orlando Sentinel/Tribune News Service

The weather has long been a favorite scapegoat of executives trying to explain disappointing earnings. Customers shying away from buying new clothes? It's the long, hot summer. People drinking less beer than expected? Blame it on rain during the Euro Cup. Consumers not booking vacations? The heat wave is keeping would-be travelers at home.

But as weather has turned more extreme, it's no longer just a convenient scapegoat — it really *is* the problem. Look no further than the destruction wreaked by Hurricane Milton, which forced Walt Disney Co. to close its theme parks in Florida this week. It's reportedly only the 10th time in a half century a hurricane has shut down Disney World.

The monetary impact for Disney will be real and considerable. Bloomberg Intelligence's Geetha Ranganathan estimates the park closures could mean a hit of up to \$200 million in revenue and \$125 million in operating income for Disney during its current fiscal quarter. And the effects will linger long beyond the immediate aftermath of the storm; Milton could lower US attendance at Disney's parks during the period that closes at the end of the year by an estimated 4 percentage points, according to Goldman Sachs.

The historical data that analysts can point to for context are starting to pile up. In 2017, Hurricane Irma cost the company \$100 million in operating income when it closed the parks for two days, cutting into US attendance in the quarter by about 3 percentage points, according to Goldman Sachs. Hurricane Ian led to another two-day closure in 2022 and a \$65 million drag. (This time the closure lasted a day and a half; Disney reopened most of its park operations Friday.)

But as theme parks have become an increasingly important part of Disney's business, the stakes have gotten higher. The experiences division, which includes Disney World and the other parks, generates about a third of the company's revenue but two-thirds of its profit. Last year, Disney said it

would nearly double its spending on the business, which has been fighting softening consumer demand due to inflation, to about \$60 billion over the next decade.

This is playing out in Florida, where Governor Ron DeSantis has made Disney the poster child of his crusade against “woke capitalism.” He’s turned the state into the hub of the anti-ESG movement, decrying companies’ environmental, social and governance initiatives as merely a way for them to impose their left-leaning agendas on the rest of society. “We want them to act as fiduciaries. We do not want them engaged on these ideological joyrides,” DeSantis said last year when he signed an anti-ESG bill that went farther than any other state’s.

Disney’s punching bag status for Republicans on an anti-ESG crusade has spread beyond the state. When Disney acknowledged in its 10-K filing last year that one of the risks to its brand was consumers’ perceptions of its position on the environment and social issues, Oklahoma Treasurer Todd Russ pounced on it as evidence to support Oklahoma’s own anti-ESG law. “Disney is a great example of how putting ESG policies over investor earnings is bad for business and doesn’t belong in this arena,” Russ said.

But as Hurricane Milton shows yet again, climate change is bad for business — and companies do have a fiduciary responsibility to combat it. Disney is taking steps in that direction with efforts like pledging to reduce absolute emissions from its direct operations by nearly 50% and to purchase or produce only zero-carbon electricity by 2030.

This is ESG’s true purpose — not a PR move to paint a brand as a corporate do-gooder, nor an attempt to impose some kind of social agenda. It’s a strategic decision and business imperative to protect a company’s assets and its future.

More From Bloomberg Opinion:

- Disney Board’s Relationship With Bob Iger Is Inside Out: Beth Kowitt
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Ex-UFC fighters cite financial, physical woes in support of \$375 million antitrust settlement

 [courthousenews.com/ex-ufc-fighters-cite-financial-physical-woes-in-support-of-375-million-antitrust-settlement](https://www.courthousenews.com/ex-ufc-fighters-cite-financial-physical-woes-in-support-of-375-million-antitrust-settlement)

Erik Uebelacker

(CN) — More than 50 former Ultimate Fighting Championship athletes are urging a federal judge to approve a \$375 million settlement in their antitrust class action against the fight promotion, arguing that they need the money to address dire financial and medical issues.

“I need urgent medical attention and treatment now including physical therapy, chiropractic therapy, counseling and neurological treatment,” Sean Spencer, an eight-fight UFC veteran, wrote in a court filing. “I have not been receiving the necessary care to maintain my health due to the expenses of healthcare which I cannot afford.”

Spencer was one of dozens of ex-fighters who filed declarations in their antitrust case late Monday night, pleading with U.S. District Judge Richard Boulware of the District of Nevada to greenlight their latest settlement agreement with the UFC. The case was settled once before, but Boulware axed the agreement in July after he expressed concerns that it wasn’t a good enough deal for the fighters.

Worried that the new settlement could suffer the same fate, 54 fighters in the class wrote to Boulware to describe why the offer on the table is better for them than waiting for trial.

“My family deserves a healthier me and I desperately need help now — not years from now,” Spencer continued in his declaration. “This would truly be life-changing money for me and for other members of the class.”

The new settlement offer, reached between fighters and the UFC’s parent company in September, is undoubtedly a better deal for the athletes than the one Boulware nixed this summer.

The initial offer, in addition to being \$40 million less, would have settled two active antitrust class actions against the UFC: *Le v. Zuffa*, which is aimed at recovering lost wages for the athletes, and *Johnson v. Zuffa*, which looks to implement changes to the UFC’s business model to make the MMA market more competitive.

The new \$375 million offer settles only *Le*, meaning the fight for better business in the UFC could continue with *Johnson* even if the offer is approved. Separating the two cases seemed to address one of Boulware’s biggest concerns about the first settlement: that it didn’t include meaningful injunctive relief for the *Johnson* class.

Still, approval of the new offer isn't guaranteed. At past hearings Boulware also took issue with the fact that the UFC could be on the hook for much more — billions of dollars — should both cases go to trial.

But after 10 years of litigating, some of those *Le* fighters say they need their payout now. UFC Hall of Famer Wanderlei Silva wrote in his declaration that he's experiencing symptoms consistent with CTE, a degenerative brain disease affecting those who experience repetitive head trauma.

"These funds would also allow me to obtain the healthcare I need and keep a roof over my head and food on the table," Silva wrote. "The sad reality is that funds years from now may be of no use to me. I can use and enjoy these funds with my family now."

Diego Sanchez, another UFC Hall of Famer who fought a whopping 32 times for the organization, wrote that "day to day survival is a struggle" due to his post-career financial situation.

If he gets his settlement cash, Sanchez said he'd spend it on healthcare expenses, paying off debt and getting a piece of land in New Mexico for his family.

Under the settlement offer, more than 1,000 ex-UFC fighters could each receive payouts between \$15,000 and more than \$1 million based on how many times they fought for the organization, among other factors.

Gray Maynard, a 20-fight UFC veteran, told Courthouse News on Tuesday that he's not quite sure how much he'd be entitled to should the *Le* settlement go through. But he knows that winning a trial against a multibillion-dollar company like the UFC is no small feat.

"People are hurt," Maynard said. "So we would like to get paid now."

Even if the fighters are victorious, Maynard acknowledged that the UFC's vow to appeal a verdict against it could mean his colleagues wouldn't see payouts for years.

"Maybe I could have waited like, two, three, four years to go to trial or whatever," Maynard said. "But a lot of guys, they can't. A lot of these guys need this."

Maynard said it was "depressing" for him to read the declarations from fellow fighters, many of whom detailed the ruin of both their bodies and their bank accounts after spending their careers in the UFC. Maynard submitted a declaration, too, where he said that he'd spend his settlement money on his kids' college plans and support his wife's business.

"I and nearly all UFC fighters were underpaid throughout our professional careers, and we have already been waiting more than 14 years for some form of justice," Maynard wrote.

Maynard, one of the more outspoken critics of UFC pay over the years, is also just looking for some peace of mind.

“If it does happen, maybe all of that fighting and competing was worth it a little bit more, right?” Maynard asked.

Boulware hasn’t indicated when he’d rule on the new settlement. If it’s denied, trial in the *Le* case is slated for early 2025.

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US judge to hear objections to Boeing plea deal in fatal crashes

 [reuters.com/legal/us-judge-hear-objections-boeing-plea-deal-fatal-crashes-2024-10-11](https://www.reuters.com/legal/us-judge-hear-objections-boeing-plea-deal-fatal-crashes-2024-10-11)

Mike Spector

Item 1 of 2 Family members hold photos of the victims of Boeing 737 MAX crashes before the House Transportation and Infrastructure Committee during a hearing on the grounded 737 MAX in the wake of deadly crashes, on Capitol Hill in Washington, U.S., October 30, 2019. REUTERS/Sarah Silbiger/File Photo

[1/2]Family members hold photos of the victims of Boeing 737 MAX crashes before the House Transportation and Infrastructure Committee during a hearing on the grounded 737 MAX in the wake of deadly crashes, on Capitol Hill in Washington, U.S., October 30, 2019. REUTERS/Sarah Silbiger/File Photo [Purchase Licensing Rights](#) , opens new tab

- Judge to hear objections from crash victims' families
- DOJ defends plea deal as fair and just
- Families call plea agreement a 'sweetheart' deal lacking accountability

NEW YORK, Oct 11 (Reuters) - A federal judge is set to hold a hearing on Friday to consider objections from relatives of people killed in two Boeing 737 MAX crashes to the U.S. planemaker's agreement to plead guilty to conspiring to defraud regulators.

U.S. District Judge Reed O'Connor in Fort Worth, Texas, is slated to hear arguments from Boeing (BA.N) , opens new tab and federal prosecutors arguing he should accept the plea deal, and lawyers for the relatives urging him to reject it. The judge may decide on Friday whether to accept the plea deal or rule on it later.

The judge has fielded hundreds of pages of legal briefs from the parties over the past several weeks. The families of the 346 people who perished in the plane crashes, which occurred in 2018 and 2019, contend the plea agreement is a "sweetheart" deal that doesn't go far enough in holding Boeing or its executives accountable for the deaths of their loved ones.

Boeing and the U.S. Department of Justice declined to comment. The Justice Department has defended the agreement, describing it in a court filing as "fair and just, as well as a strong resolution of this matter that serves the public interest."

Prosecutors arrived at the plea agreement after an extensive investigation and a series of meetings with the families, they said. "Yet in the end," the prosecutors said in an August court filing, DOJ officials have "not found the one thing that underlies the families' most passionate objections to the proposed resolution: evidence that could prove beyond a reasonable doubt that Boeing's fraud caused the deaths of their loved ones."

Boeing "profoundly regrets the accidents and the unspeakable losses" the families suffered, the company said in its own August court filing. Boeing is "prepared to plead guilty and thereby accept ultimate responsibility for the crime" of conspiring to defraud regulators, the company said. The planemaker has significantly strengthened, and increased investment in, its safety and compliance practices, Boeing said.

Boeing in July finalized the agreement with prosecutors requiring the planemaker to plead guilty to fraud in connection with the two fatal plane crashes.

The planemaker agreed to pay up to a \$487.2 million fine and spend at least \$455 million on improving safety and compliance practices over three years of court-supervised probation as part of the plea deal. The agreement allows the judge to cut the fine in half by crediting Boeing for money it previously paid in the case.

Justice Department officials pushed Boeing to take the plea deal after finding the company had violated the terms of a 2021 agreement that had shielded it from prosecution over the crashes, which effectively reopened the case.

That finding followed a separate January in-flight blowout that exposed ongoing safety and quality issues at Boeing. A panel blew off a new Boeing 737 MAX 9 jet during a Jan. 5 Alaska Airlines flight, just two days before the 2021 agreement shielding Boeing from prosecution over the previous fatal crashes expired.

In the criminal case over the fatal crashes, prosecutors contend they have extracted an agreement from Boeing to plead guilty to the most serious charge they could prove, along with payment of the maximum legally allowed penalty.

The two crashes at the center of the criminal case against Boeing occurred in Indonesia and Ethiopia over a five-month period.

A guilty plea, should the judge accept it, would brand Boeing a convicted felon for conspiring to defraud the U.S. Federal Aviation Administration (FAA) about problematic software affecting the flight-control systems in the planes.

On top of the plea deal's financial implications, the agreement also imposes a monitor to audit Boeing's safety and compliance efforts and allows the judge at sentencing to force the company to pay additional compensation to families whose relatives died in the crashes.

Polish national airline LOT also opposes the plea deal and has argued it should have the same rights as the crash victims' families.

Victims' relatives want Boeing and its executives charged with crimes holding them responsible for the deaths of their loved ones and any evidence of wrongdoing presented in a public trial. They have also argued Boeing should have to pay up to \$24.78 billion in connection with the crashes.

Judge O'Connor, considered one of the most conservative judges in the country, has previously expressed strong sympathy for the families of the 737 MAX crash victims and called the Boeing case "the deadliest corporate crime in U.S. history."

Reporting by Mike Spector; additional reporting by Chris Prentice. Editing by Nick Zieminski

Mike Spector
Thomson Reuters

Mike Spector is an Investigative Reporter for Reuters' legal team. He strives to pursue special reports and other enterprising and exclusive stories that expose wrongdoing, highlight threats to consumers and illuminate how ordinary people are affected by the decisions of judges and lawyers across the United States. His stories often involve corporate crises linked to bankruptcy proceedings, mass tort litigation and government investigations. He was the first journalist to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder and other cosmetic talc products caused cancer. A series he led explaining how companies and nonprofits use the bankruptcy system to evade lawsuits over sexual abuse and deadly products received the Deadline Club's Daniel Pearl Award for Investigative Reporting. He has also investigated pervasive secrecy in American courts that covers up evidence of deadly products and allegations from Black women that chemical hair relaxers sold by large cosmetics companies caused cancer. He previously worked at The Wall Street Journal covering bankruptcy, private equity, mergers and acquisitions and the automotive industry.

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Litigators of the Week: Jeffrey Kessler and Steve Berman Reach a Settlement With the NCAA that Reshapes College Sports

 [law.com/litigationdaily/2024/10/11/litigators-of-the-week-jeffrey-kessler-and-steve-berman-reach-a-settlement-with-the-ncaa-that-reshapes-college-sports](https://www.law.com/litigationdaily/2024/10/11/litigators-of-the-week-jeffrey-kessler-and-steve-berman-reach-a-settlement-with-the-ncaa-that-reshapes-college-sports)

Ross Todd

The economic model of college sports in the United States already looks quite different than it did when **Jeffrey Kessler** of **Winston & Strawn** and **Steve Berman** of **Hagens Berman Sobol Shapiro** first teamed up in antitrust litigation against the National Collegiate Athletic Association and major conferences about a decade ago.

But thanks to a settlement that received preliminary sign-off this week from U.S. District Senior Judge Claudia Wilken in Oakland, the state of play in college sports is set to change even more dramatically. Kessler and Berman won preliminary approval of a settlement that will pay more than \$2.75 billion in back damages to college athletes who competed before July 2021, the time when the NCAA first allowed athletes to earn money from their name, image and likeness rights. On top of that, the deal will allow schools to share revenue with current players through pools of up to about \$21.5 million in the first year of the deal.

Litigation Daily: Briefly walk me through the three separate class actions you filed against the NCAA and the Power 5 conferences at issue here and what they each targeted.

Jeffrey Kessler: The *House* litigation challenged the NCAA rules restricting payments for the Name, Image, and Likeness (NIL) rights of Division I athletes, including for the rights to use football and basketball players' NIL in broadcasts of their games. The *Hubbard* case sought damages for those athletes who were deprived of the cash academic achievement awards held to be lawful in our *Alston* litigation before the Supreme Court. The *Carter* litigation challenged the NCAA rules prohibiting schools and conferences from compensating Division I athletes for their participation on their teams. Taken together, the cases have been the vehicle for dramatically transforming college sports and opening the door to revenue sharing at a level comparable to professional sports.

Steve Berman: Jeff nailed it.

Who is on your teams and how have you divided the work that got you to this settlement agreement?

Kessler: We have a terrific team at Winston from top to bottom. This includes my partners **David Greenspan**, **David Feher**, **Jeanifer Parsigian**, **Adam Dale**, **Matt DalSanto** and **Sofia Arguello**, associates **Sarah Viebrock**, **Scott Sherman**, **Joseph Blake**, **Robert**

Pannullo, Neha Vyas, Whitney Williams and Nick Sloan, as well as other Winston team members **Corinne Kyritsopoulos, Rick Rosario, Shane Otten, Tessa Nguyen and Ramona VanNess**. Each one has made an important contribution to get us to this landmark settlement.

Berman: The Hagens Berman team included **Emilee Sisco and Stephanie Verdoia**, who along with myself are former college athletes. In addition, we had on our team **Ben Siegel** from our Berkeley office and **Meredith Simons** from our Seattle office.

Your law firms have significant differences in terms of size and structure and yet you've been working alongside each other on these cases against the NCAA for more than a decade now. How would you describe the working relationship?

Kessler: We have become true partners and close friends. While our firms are different in size, and we have different experiences and perspectives, we share a common dedication to the college athletes, who have been economically exploited for so many years.

Berman: During the *Alston* case we developed a great working relationship and became friends. Which is an interesting development because we see Winston against us often in non-sports class actions.

I'd like to ask you both if there's anything skill-wise or strategy-wise that you have picked up from working with one another?

Kessler: Steve has taught me the importance of moving more nimbly and simplifying where the temptation might be to over-litigate or complicate.

Berman: Jeff has one of the best antitrust minds I have worked with, so it's been a pleasure working with him.

Mr. Berman, you told the court that when you went into your first session with the defendants and the mediator in this case, you told them you had to negotiate the injunction first and that you wouldn't talk about anything else until the injunction was finished. Why was that?

Berman: We knew, given the size of the case and its prominence, certain lawyers would be looking for a way to object and sue that as a vehicle to get a seat at the table (and get fees). We were aware of the decision in the payment case overturning a settlement on the grounds that class counsel had a conflict evidenced by a weak injunctive settlement. So, to cut off this type of objection we focused on the injunction first. And we predicted perfectly the objection that did in fact come and we beat it as a result of the way we approached settlement.

You've had multiple groups tell the judge they believe the allocation of the \$2.75 billion in damages is unfair to women athletes and could violate Title IX. What has your response been to the potential Title IX issues?

Kessler: We have settled antitrust litigation, which requires us to allocate past damages in accordance with the revenues for each sport. Title IX claims have not been prosecuted or released by our settlement. Women sports have not been adequately supported in the past, but we cannot right that wrong with antitrust damages.

What's important here in this settlement for college athletes—past, present and future?

Kessler: The injunctive relief will transform college sports, providing for tens of billions of dollars in future revenue sharing with the athletes and unlimited scholarships. The past damages are almost \$3 billion, which is one of the largest antitrust settlements in history.

How, if at all, have the NCAA and the conference defendants changed as litigation opponents in the time that you've been up against them?

Kessler: It took more than 10 years, but they finally realized that it was better to reach a fair settlement in which they could help shape the future rather than fight to the death in endless litigation, in which they were suffering repeated losses.

What will you remember most about getting this result?

Kessler: The courage of the athletes who stood up to be class representatives and the difference that this settlement is going to make in the lives of generations of college athletes going forward.

Judge slashes \$185 mln award for law firm Quinn Emanuel in US healthcare case

 [reuters.com/legal/government/judge-slashes-185-mln-award-law-firm-quinn-emanuel-us-healthcare-case-2024-10-10](https://www.reuters.com/legal/government/judge-slashes-185-mln-award-law-firm-quinn-emanuel-us-healthcare-case-2024-10-10)

Mike Scarcella

The Series 1996 \$100 bills were unveiled at the U.S. Treasury Bureau of Engraving during a press tour of the production of the new bills, March 21. The Series 1996 bills feature a new design that is the culmination of a five-year study aimed at staying ahead of the counterfeiting threat and is part of a continuing process to... Purchase Licensing Rights , opens new tab Read more

Oct 10 (Reuters) - A U.S. judge in Washington, D.C., on Thursday cut in half a \$185 million legal fee payout for Quinn Emanuel Urquhart & Sullivan, awarding the law firm \$92.4 million for its work on a multibillion-dollar federal healthcare insurance case.

Judge Kathryn Davis of the U.S. Federal Claims Court said the reduced amount was a reasonable reward for Quinn Emanuel, a top U.S. business litigation firm.

Quinn was awarded \$185 million for its work on the case in 2021, but a federal appeals court last year struck down the award as excessive and ordered Davis to reconsider it.

Davis on Thursday found the 900-lawyer firm's hours were "improperly inflated and must be reduced."

Quinn Emanuel had urged the judge at a hearing in July to again approve the firm's \$185 million fee. A group of health insurers led by UnitedHealthcare and Kaiser Foundation Health Plan opposed the fee amount, calling it "astronomical."

Quinn Emanuel, UnitedHealthcare and Kaiser did not immediately respond to requests for comment.

In the underlying case, Quinn Emanuel secured a \$3.7 billion judgment in 2020 for a class of insurers that said the Obama administration failed to meet its obligations under an Obamacare provision aimed at encouraging medical coverage to uninsured Americans.

The \$185 million fee amounted to 5% of the judgment fund. Quinn Emanuel had defended the award as justified based on the novelty of the case and the risk the firm took in pursuing the litigation. The firm said it had sunk about 10,000 hours into the litigation.

UnitedHealthcare and Kaiser told Davis that the request translated to more than \$18,000 an hour for Quinn Emanuel. Top partners at the Los Angeles-founded firm often bill between \$1,500 and \$2,000 an hour, court records show.

A lawyer for the insurers, Moe Keshavarzi of Sheppard Mullin Richter & Hampton, had urged Davis to approve a fee award no larger than about \$11 million to \$23 million.

Davis said the objectors' proposed fee was "so low as to disincentivize attorneys from pursuing class actions."

The new fee award amounts to 2.5% of the judgment fund, Davis wrote. She credited the firm for developing what she said was "the novel, winning legal theory" underpinning the litigation.

Quinn Emanuel has told Davis that it already distributed the \$185 million within the firm and that it obtained insurance on the award.

The case is Health Republic Insurance Co v United States, U.S. Court of Federal Claims, No. 1:16-cv-00259.

For Health Republic: Adam Wolfson and Andrew Schapiro of Quinn Emanuel Urquhart and Sullivan

For class objectors: Moe Keshavarzi of Sheppard Mullin Richter & Hampton

Read more:

Legal Fee Tracker: Quinn Emanuel fights to keep \$185 million award in Obamacare case
Health insurers slam renewed \$185 million fee bid by Quinn Emanuel
Reporting by Mike Scarcella

Quinn Emanuel Obamacare Fee Slashed in Half to \$92 Million (1)

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Class Action

Photo Illustration: David Evans/Bloomberg Law; Photo: Getty Images

- Federal Circuit ordered lodestar crosscheck of initial award
- New award is 2.5% of \$3.7 billion judgment in Obamacare case

A federal judge cut in half Quinn Emanuel's massive fee for work on a lawsuit by health insurers, reducing the firm's take to \$92.4 million.

The Thursday decision is a loss for the litigation firm, though it had already locked in the majority of its payment through a fee insurance policy.

Quinn Emanuel lawyers secured \$3.7 billion in damages for insurers seeking Obamacare repayment in a case decided by the US Supreme Court in 2020. The firm initially was awarded \$185 million in fees, or nearly 10% of Quinn's annual gross revenue last year. A group of health insurers challenged the total as excessive, arguing that it should be slashed to between \$12 million and \$23 million.

A fee of 2.5% of the damages award is reasonable and justified because of the case's complexity, the result obtained, and the "very real risk of nonpayment," Judge Kathryn C. Davis of the US Court of Federal Claims said Thursday.

The \$92 million fee isn't a windfall for Quinn Emanuel, which "pioneered the winning legal theory that greatly benefited" all the plaintiffs, she said.

The firm obtained a judgment preservation insurance policy on the award after the Supreme Court's ruling in the case. The policy insured the award against the legal risk of being overturned on appeal.

The new decision is the latest development in a long running dispute over the fees. Quinn's initial award represented 5% of the damages awarded to the health insurers the firm represented in the Obamacare suit. The Federal Circuit put the award on hold and asked the Federal Claims Court to do a lodestar comparison, looking at the number of hours worked on the case and the hourly rate the firm charged.

Quinn Emanuel represents itself in the fee dispute. The objecting class members are represented by Sheppard Mullin.

The case is Health Republic Ins. Co. v. United States. , Fed. Cl., No. 1:16-cv-00259-KCD, 10/10/24 .

(Updated with additional reporting throughout.)

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Supreme Court Will Decide If the 5th Circuit Allows 'Blatant Forum Shopping'

 [law.com/nationallawjournal/2024/10/10/supreme-court-will-decide-if-the-5th-circuit-allows-blattant-forum-shopping](https://www.law.com/nationallawjournal/2024/10/10/supreme-court-will-decide-if-the-5th-circuit-allows-blattant-forum-shopping)

Jimmy Hoover

The U.S. Court of Appeals for the Fifth Circuit in New Orleans. Photo: Mike Scarcella/ALM

On the surface, "FDA v. R.J. Reynolds Vapor" centers around a routine question of statutory standing about what is the proper forum where litigants can challenge negative rulings by a federal agency.

October 10, 2024 at 05:59 PM

United States Supreme Court

By Jimmy Hoover



A new U.S. Supreme Court term tells a familiar story. In case after case, the justices will be reviewing the work of a conservative federal appeals court at the request of a presidential administration that just can't seem to win before it.

Since President Joe Biden took office, his administration has taken regular trips to the Supreme Court to appeal losing decisions from the U.S. Court of Appeals for the Fifth Circuit, a tribunal with a historic pedigree of Southern desegregation that was made far more conservative under the presidency of Donald Trump.

Many of those recent Fifth Circuit appeals feature headline-grabbing subjects such as abortion, guns, immigration, and social media censorship. But a new case taken up by the court last Friday shows how, even in the dry and arcane area of administrative law, the circuit court continues to stir controversy.

On the surface, *FDA v. R.J. Reynolds Vapor* centers around a routine question of statutory standing about what is the proper forum where litigants can challenge negative rulings by a federal agency.

Since 2016, the U.S. Food and Drug Administration has interpreted the federal Family Smoking Prevention and Tobacco Control Act to require makers of e-cigarettes to show their new products won't negatively affect public health before allowing them on the market. The FDA has denied countless such applications, including from the respondent in this case: tobacco giant R.J. Reynolds.

R.J. Reynolds sought to challenge the denial in court so the company could start marketing a new menthol-flavored vape product called Vuse Alto.

There was just one problem: The FSPTCA allows parties that have been "adversely affected" by an FDA denial to sue only in the D.C. Circuit or the circuit where they reside.

For Winston-Salem, North Carolina-based R.J. Reynolds that meant the only place to file their challenge was in the nation's capital or in the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia. But like the D.C. Circuit, the Fourth Circuit has already rejected many of the same legal arguments the company was preparing to make for why it should be allowed to market Vuse Alto.

Facing that dilemma, R.J. Reynolds decided to join with a Texas retailer and an association of Mississippi gas stations in order to bring their case in the Fifth Circuit, which covers both Texas and Mississippi (as well as Louisiana) and has proved more receptive to challenges to administrative actions.

It is a strategy the company has used in other cases as well, and other manufacturers have followed suit, including one based in Shenzhen, China.

It's also a tactic that the Fifth Circuit upheld in a February decision finding nothing in the law prevents R.J. Reynolds from riding the coattails of other entities to challenge the denial of its Vuse Alto product.

"This Court should grant review to put a stop to that practice," the FDA stated in its successful petition for Supreme Court review.

The Biden administration makes two principal arguments for reversal.

The first is that retailers such as Avail Vapor Texas are not "adversely affected" parties that can challenge the FDA's decision to deny a manufacturer's new e-cigarette product, even if they intend to sell those products in their stores. Only the applicants themselves can bring such a challenge.

But even if the retailers are adversely affected, that still doesn't mean R.J. Reynolds can bring its challenge in the Fifth Circuit, the government argues.

"Venue under the Act is party-specific; a petitioner as to whom venue is improper may not tag along with a different petitioner as to whom it is proper," the U.S. Department of Justice wrote in the FDA's petition.

Although perhaps a wonky issue of statutory venue rules, the case strikes at a bigger debate happening within the court system when it comes to litigants bringing administrative law challenges in the Fifth Circuit.

According to the DOJ, the Fifth Circuit's ruling "facilitates blatant forum shopping" and "undermines the precedents of other courts."

R.J. Reynolds, represented by attorney Noel Francisco, counters that it is simply reading the words of the statute allowing any "adversely affected" party to bring suit, and that the government's rule on standing is too demanding.

"[V]enue needs to be proper for only one petitioner or plaintiff," the company stated in its brief opposing review.

The high court has yet to set oral arguments in *FDA v. R.J. Reynolds Vapor*, No. 23-1187. A ruling is expected by July.

The case adds to what is already shaping up to be a major year for the legal landscape of the e-cigarette industry. Back in July, the high court agreed to hear another case out of the Fifth Circuit that more squarely deals with the FDA's stance on applications for new vape products.

'The Fifth Circuit Was Wrong'

In recent years, the New Orleans-based appeals court has delivered policy setback after policy setback to the Biden administration, often advancing bold and, in some cases, novel interpretations of federal and constitutional law.

The Supreme Court, itself dominated by a Republican-appointed supermajority, has gently corrected its aggressive underling in a series of recent decisions on pressing issues from guns to abortion drug access to the constitutionality of social media regulations.

"The Fifth Circuit was wrong to do so," Justice Amy Coney Barrett declared in a decision last term reversing the appeals court for affirming a "sweeping" injunction against government officials in their talks with social media companies.

"For its part, the Fifth Circuit made two errors," Chief Justice John Roberts Jr. wrote in another case, finding that, contrary to the appeals court's decision below, a federal law disarming suspected domestic abusers does not violate the Second Amendment.

But the circuit court continues to be a favored forum for Republican attorneys general and other litigants to sue the government.

Already this term, the Supreme Court has heard the administration's appeal of a Fifth Circuit decision invalidating a federal regulation aimed at combating the rise of "ghost guns," untraceable weapons that can be assembled in under an hour from parts ordered over the internet.

Even the conservative wing of the Supreme Court expressed skepticism of the Fifth Circuit's holding that a weapons part kit does not fall under a 1968 gun control law.

"My understanding is it's not terribly difficult to [assemble one]," Roberts said.

Still, the Fifth Circuit hasn't been skunked entirely when its decisions come before the Supreme Court.

In one of the biggest administrative law decisions in recent years, the court's conservative majority last term agreed with the appeals court that the U.S. Securities and Exchange Commission had been depriving people of their Seventh Amendment right to a jury trial by having their own in-house judges impose civil fines for securities fraud.

"The judgment of the Court of Appeals for the Fifth Circuit is affirmed," Roberts wrote in the case *SEC v. Jarkesy*, a pat on the back for an appeals court that surely needed one.

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Who Got The Work

Dechert partners Andrew J. Levander, Angela M. Liu and Neil A. Steiner have stepped in to defend Arbor Realty Trust and certain executives in a pending securities class action. The complaint, filed July 31 in New York Eastern District Court by Levi & Korsinsky, contends that the defendants concealed a 'toxic' mobile home portfolio, vastly overstated collateral in regards to the company's loans and failed to disclose an investigation of the company by the FBI. The case, assigned to U.S. District Judge Pamela K. Chen, is 1:24-cv-05347, Martin v. Arbor Realty Trust, Inc. et al.

Who Got The Work

Arthur G. Jakoby, Ryan Feeney and Maxim M.L. Nowak from Herrick Feinstein have stepped in to defend Charles Dilluvio and Seacor Capital in a pending securities lawsuit. The complaint, filed Sept. 30 in New York Southern District Court by the Securities and Exchange Commission, accuses the defendants of using consulting agreements, attorney opinion letters and other mechanisms to skirt regulations

limiting stock sales by affiliate companies and allowing the defendants to unlawfully profit from sales of Enzolytics stock. The case, assigned to U.S. District Judge Andrew L. Carter Jr., is 1:24-cv-07362, Securities and Exchange Commission v. Zhabilov et al.

New Suit - Securities Class Action

UPS and the company's top officials were slapped with a securities class action on Oct. 10 in Georgia Northern District Court. The court case, brought by Holzer & Holzer and Levi & Korsinsky, contends that the defendants disseminated false statements regarding the true state of UPS' growth, including that the company was not equipped to handle a surge in volume in lower profit services without seeing a decline in profit margins. Counsel have not yet appeared for the defendants. The case is 1:24-cv-04591, Savage v. United Parcel Service, Inc.

New term, same ethics problems: Gorsuch's ties to oil billionaire reignite calls for court oversight

 [courthousenews.com/new-term-same-ethics-problems-gorsuchs-ties-to-oil-billionaire-reignite-calls-for-court-oversight](https://www.courthousenews.com/new-term-same-ethics-problems-gorsuchs-ties-to-oil-billionaire-reignite-calls-for-court-oversight)

Kelsey Reichmann

WASHINGTON (CN) — As a new Supreme Court term dawned this week, so did new questions about the justices' ethical standards, this time focusing on Justice Neil Gorsuch's ties to an oil billionaire.

The Donald Trump appointee is being called to recuse from an environmental case on the high court's docket, *Seven County Infrastructure Coalition v. Eagle County, Colorado*, because of his cozy relationship with Philip Anschutz. The owner of Anschutz Exploration Corporation stands to benefit heavily if the court greenlights an 88-mile oil and gas rail line in Utah.

"The cozy relationship between Philip F. Anschutz and Justice Gorsuch far surpasses the standard of 'reasonably questioned impartiality' for the federal recusal statute," watchdog group Accountable.US and others wrote in a letter to Chief Justice John Roberts on Thursday. "This relationship that creates a conflict of interest is just the latest example of countless violations in the yearslong Supreme Court ethics crisis."

The letter signed by just over a dozen advocacy groups highlighted the consequences of the court's stagnation on this issue. After years of ethical scandals surrounding the justices, there are still many open questions over when the justices need to recuse and how that decision is made.

"It certainly seems emblematic of the broader problem of there not being a specific and descriptive code of conduct that the justices need to follow that's enforceable in any way," Sarah Turberville, the director of The Constitution Project, said in an interview. "Perhaps in this case, it's illustrative of the need for an ethics council who's available to really provide specific guidance to the justices."

Gorsuch served as counsel to Anschutz and his companies in the early 2000s. The Trump appointee has detailed annual hunting retreats on Anschutz's estates and even bought an investment property with Anschutz business associates.

Anschutz's oil wells in Utah's Uinta Basin could benefit from the contested railway, which would cut the company's freighting costs and increase profits, according to Accountable.US. His company filed an amicus brief before the court, urging the justices to ruling in favor of the line's construction.

“Anschutz urges the court to confirm that *Public Citizen* limits the scope of an agency’s NEPA analysis — consistent with NEPA’s purpose to foster informed agency decision-making — such that an agency need only study those environmental effects over which the agency has regulatory authority,” the company wrote in its brief.

NEPA, the National Environmental Policy Act, requires government agencies to assess the environmental impacts of industry projects. The high court’s review puts NEPA in the crosshairs.

“The Supreme Court has long been not a fan of the NEPA, but this case will allow it to speak broadly on exactly what kind of impacts are to be considered,” Lisa Heinzerling, a law professor at Georgetown Law, said. “When this comes to climate change it’s really important. A rail line that didn’t exist before, that can make waxy crude oil available in great quantities when it might not have been available before has huge climate impacts.”

With oil and gas operations in Colorado, Utah and Wyoming, Anschutz must undergo a Bureau of Land Management environmental review for every development in its portfolio.

“Because NEPA applies to every major federal action — including the authorizations Anschutz needs to develop federal oil and gas reserves — far more is at stake in this case than the 88-mile rail line in rural Utah,” Anschutz wrote.

Accountable.US says rolling back the law would lower Anschutz’s regulatory costs and drive up its profits. The watchdog argued that Gorsuch’s relationship with Anschutz creates questions around the justice’s impartiality — the standard for recusal under the federal statute.

While the advocacy groups claim Gorsuch’s recusal is warranted, the justice himself will be the one to decide whether he hears the case.

Gabe Roth, executive director at Fix the Court said recusal calls on Justices Clarence Thomas and Samuel Alito presented much clearer conflicts. The same can’t be said here.

“It’s a little bit more attenuated, and it would be worth having someone file a complaint to a neutral body that could then look into this, that would have the resources to call up, or that would have the authority to call up Gorsuch,” Roth said.

It’s been almost two decades since Gorsuch worked as outside counsel for Anschutz’s company, and currently there’s no public accounting of their relationship after 2017.

Since anyone can file an amicus brief before the court, the court does not require recusals for a justices’ connection to amici.

Ethics experts have long advocated for an independent body to conduct oversight for this exact situation. According to the ethics code, justices must recuse if a reasonable person knowing all the facts involved would believe the justice to be biased.

Roth said the problem with calls for Gorsuch's recusal from the Utah rail case is that all the facts aren't yet available.

"Bringing in someone who isn't the justice him or herself to do that analysis, to look at the issue, I think, is critical," Roth said. "It's something that's done in dozens of state courts and apex courts around the world, so the idea that the judges are the only ones making this decision is ridiculous."

Aside from signing onto a code of conduct, the court hasn't seemed moved by calls for reforms. Justice Elena Kagan, a Barack Obama appointee, however, repeatedly suggested that a committee of lower court judges could enforce their newly minted code.

"The thing that can be criticized is: Rules usually have enforcement mechanisms attached to them, and this set of rules does not," Kagan said during a conference in July.

This year, Alito demonstrated the justice's authority over ethics enforcement. Democratic lawmakers asked Chief Justice John Roberts to force his colleague to recuse. Roberts said the decision was solely up to Alito's discretion.

There's no sign that this letter will end with a different result.

"We have relied on the chief for too long to act as some sort of steward of ethical conduct at the court," Turberville, of The Constitution Project, said. "And despite his best efforts — or perhaps because he has not made his best efforts — that has failed."

But Turberville said an independent ethics body could remove Roberts from a role he seems reluctant to take up.

"I'm not really sure that the chief justice should have such a role in trying to police the conduct of his peers because they are his peers," Turberville said. "They're the people you have to work with every day in a position that all of them sit in for lifetime tenure. So there has to be sort of outside independent advice given to them."

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Teva to pay \$450 million to resolve US kickback, price-fixing cases

 [reuters.com/legal/teva-agrees-pay-450m-resolve-kickback-allegations-us-justice-dept-says-2024-10-10](https://www.reuters.com/legal/teva-agrees-pay-450m-resolve-kickback-allegations-us-justice-dept-says-2024-10-10)

Nate Raymond

By Nate Raymond

October 10, 2024 2:32 PM PDT Updated 17 hours ago

The logo of Teva Pharmaceutical Industries is displayed at the company headquarters in Tel Aviv, Israel, February 20, 2024. REUTERS/Dylan Martinez/File Photo Purchase Licensing Rights , opens new tab

BOSTON, Oct 10 (Reuters) - Teva Pharmaceutical Industries Ltd (TEVA.TA) , opens new tab has agreed to pay \$450 million to resolve allegations it used charities that help cover Medicare patients' out-of-pocket drug costs as a means to pay kickbacks to boost sales of its multiple sclerosis drug Copaxone and conspired to fix prices for generic drugs.

The two settlements announced by the U.S. Department of Justice on Thursday included one , opens new tab for \$425 million resolving a lawsuit filed in federal court in Boston in 2020 as part of an industry-wide probe of drugmakers' financial support of patient assistance charities.

That investigation had previously resulted in more than \$1 billion in settlements with 12 drugmakers, four charities and one pharmacy. A lawsuit against Regeneron Pharmaceuticals arising from the same probe remains pending.

Israel-based Teva earlier said in court papers that it faced triple damages under the False Claims Act of as much as \$10 billion in the Justice Department's lawsuit.

The Justice Department also announced a separate \$25 million civil settlement with Teva resolving claims that it conspired to fix prices and allocate markets for two generic drugs. It last year agreed to pay \$225 million to resolve a related criminal case.

Teva in a statement said the \$450 million would be paid over six years. Teva said it did not admit wrongdoing in either settlement and continues to maintain that its donations to charities "supported MS patients' access to critical medicines."

Drug companies are prohibited from subsidizing co-payments for patients enrolled in Medicare, the government healthcare program for those aged 65 and older. Companies may donate to non-profits providing co-pay assistance as long as they are independent.

But the government has alleged that various pharmaceutical companies used such charities as a means to improperly cover the co-pay obligations of Medicare patients using their drugs, in violation of the Anti-Kickback Statute.

The lawsuit in Boston alleged Teva paid two such charitable foundations, the Chronic Disease Fund and The Assistance Fund, more than \$350 million from 2006 to 2017 to cover co-payments for Copaxone patients, turning the charities into vehicles to pay kickbacks to patients to use the drug.

During that time, Teva quintupled the drug's price to about \$85,000 per year from approximately \$17,000. The drug at that time was Teva's best seller, generating \$3.8 billion in revenues in 2017 alone.

Reporting by Jasper Ward and Katharine Jackson; editing by David Ljunggren and Leslie Adler

FT Alphaville · Tesla Inc

Man shows car; shares fall

FSD ≠ EMH



© via REUTERS

Bryce Elder 2 HOURS AGO



The net present value of Tesla's future cash flows is 7.8 per cent lower today than yesterday.



Source: LSEG via markets.ft.com

That's after the world's [14th-largest](#) automaker by volume hosted a product demonstration in Burbank, California. According to reports, concept products shown by the company were a two-seater car, a van, and a mannequin.

Tesla's current CEO Elon Musk told the audience that the two-seater vehicle may be sold to taxi dispatch companies when it is made available for sale "before 2027".

The present value of future cash flows for Uber, a taxi dispatch company, increased 8.1 per cent in response.

Share price, \$

— Uber Technologies



Source: LSEG via markets.ft.com

Musk said he expects Tesla cars to drive themselves in Texas and California by next year, a delay to the initial rollout target of [August 2018](#). Whether the vehicles shown were operating fully autonomously on the closed course was not made clear. Whether Musk was talking about private cars or a robotaxi service was not made clear.

Fans of Tesla were underwhelmed. “That’s it?” asked Adam Jonas, a New York-based financial analyst who works for Morgan Stanley:

“

Heading into what might arguably have been the most highly anticipated product unveil in Tesla's history, we had a number of expectations of what the market might learn that we felt were consequential to the direction and debate around the stock. Beyond the closed course test drives in autonomous 'cybercabs' and the latest Optimus, we had expected at least some incremental information around the 'rate of change' of the FSD system (i.e., quantifiable improvement of most recent FSD iterations in terms of miles without disengagement, etc), a thoughtful conveyance of a go-to-market strategy for supervised and unsupervised ridesharing service including economic inputs and TAM analysis, potential elaboration on the relationship between Tesla and xAI, or a possible discussion of 'Master Plan 4.' We were overall disappointed with the substance and detail of the presentation.

Alejandro Nuno, a New York-based financial analyst with investment bank UBS, described his ride in the Cybercab. "It was fine," he said:

“

Vehicle is small but roomy for 2. However, the vehicle just went around the staged lot. Not very complex, so not much to read into. In fact, when our ride came to our designated stop it couldn't find a spot (there wasn't one available) so it just kept on driving on to the next station in a loop instead of waiting for a spot.

Jonas was disappointed that mannequins at the event — performing tasks such as filling plastic cups with beer and dancing in a gazebo — were closely chaperoned by humans. He said:

“

It is our understanding that these robots were not operating entirely autonomously - but relied on tele-ops (human intervention) so it was more a demonstration of degrees of freedom and agility. Overall, we did not pick up on anything new/novel about Optimus that clearly showed significant progress including little incremental detail from the company that the market was not previously aware of.

Nuno added:

“

When this future occurs remains unclear, and we believe further out than indicated. Meanwhile, we believe there were high expectations for Tesla to show the Model 2.5, which wasn't shown (in line with our expectation). This is important since the new model is more likely a driver of 2025/26 estimates, in our view, than the products shown at the event.

Ryan Brinkman, a financial markets analyst from New York who works at JPMorgan, suggested that it's better to travel by Robotaxi than arrive by Robotaxi:

“

Note that as TSLA shares rose +68% since April 22 (vs. the S&P 500 +15%), Bloomberg consensus for full year 2024 vehicles sold declined by -8% from 1.94 mn on April 22 to 1.79 mn today, EBIT by -13% from \$8.4 bn to \$7.3 bn, and free cash flow by -49% from \$3.9 bn to \$1.9 bn. The outlook for next year (or the year after that) did not improve either, with the expectation for 2025 vehicles sold declining -9% from 2.25 mn in April to 2.04 mn today, 2025 EBIT by -11% from \$12.8 bn to \$11.2 bn and 2025 free cash flow by -18% from \$6.8 bn to \$5.6 bn. The obvious candidate for the stock's rise this time as the outlook for earnings deteriorated is investor anticipation for the Robotaxi Day

Having not much to say might be explained by Tesla having to follow through on a bad tweet, Brinkman added:

“

The first clue that investor enthusiasm may have been misplaced was the manner in which the event was announced in the first place – not in a press release from the company, not in a tweet from the company, not even in a tweet from Tesla CEO Elon Musk, but rather in a reply of Mr. Musk’s to another’s tweet on the X platform which appeared to at least somewhat back up his assertion that Reuters had falsely or wrongly reported earlier that day that it had reviewed internal Tesla emails documenting that work on an expected upcoming ~\$25K “Model 2” program had been cancelled or indefinitely delayed. The individual claimed that the Model 2 was not necessarily cancelled, per se, but instead repurposed as a robotaxi, to which Mr. Musk responded that all would be unveiled at a (newly announced) August 8 Tesla Robotaxi Day. This exchange turned around the intra-day decline in Tesla shares on April 8 that was sparked by the Reuters article proclaiming the Model 2 had been cancelled but it perhaps should at least in retrospect not have been assigned by investors quite the same weight as a carefully curated corporate press release. A second suggestion that expectations should have been more tempered than they were may have been the announcement on July 15 that the Robotaxi Day had been moved from 8/8 to 10/10 given a needed design change. Taken together, there seemed at least the impression that a team may have been striving mightily to meet a challenging deadline that could have come at times as a surprise.

Tom Narayan, a financial markets analyst from New York who works at RBC Capital Markets, said fellow Tesla fans should know what to expect by now:

“

Investors we spoke to at the event thought the event was light of real numbers and timelines. These typically come at Tesla events. This one seemed focused on branding and marketing Tesla's vision, rather than giving concrete numbers for us to model out. [. . .] Some investors also expected a teaser of the lower priced vehicle to be launched in H1/25 and we did not get it. Admittedly, this might have been underwhelming in the context of all the items we did see. We are still bullish on Tesla's long term prospects and on robotaxis in general. We also think humanoid robots could be the next feature that analysts will start including in their numbers.

The net present value of Tesla's future cash flows underpins a market value of \$700bn because, at this point, why not?

Further reading:

— [Police called to Willy Wonka event after refunds demanded](#) (BBC)

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Tesla Inc

Tesla shares fall after Elon Musk's glitzy 'Cybercab' event disappoints

Stock drops 8% as investors are underwhelmed by lack of detail about planned autonomous fleet



Elon Musk, the world's richest man, promised the new two-seated 'Cybercab' would be available for less than \$30,000 © Tesla

Stephen Morris in New York and **Kana Inagaki** in London 3 HOURS AGO



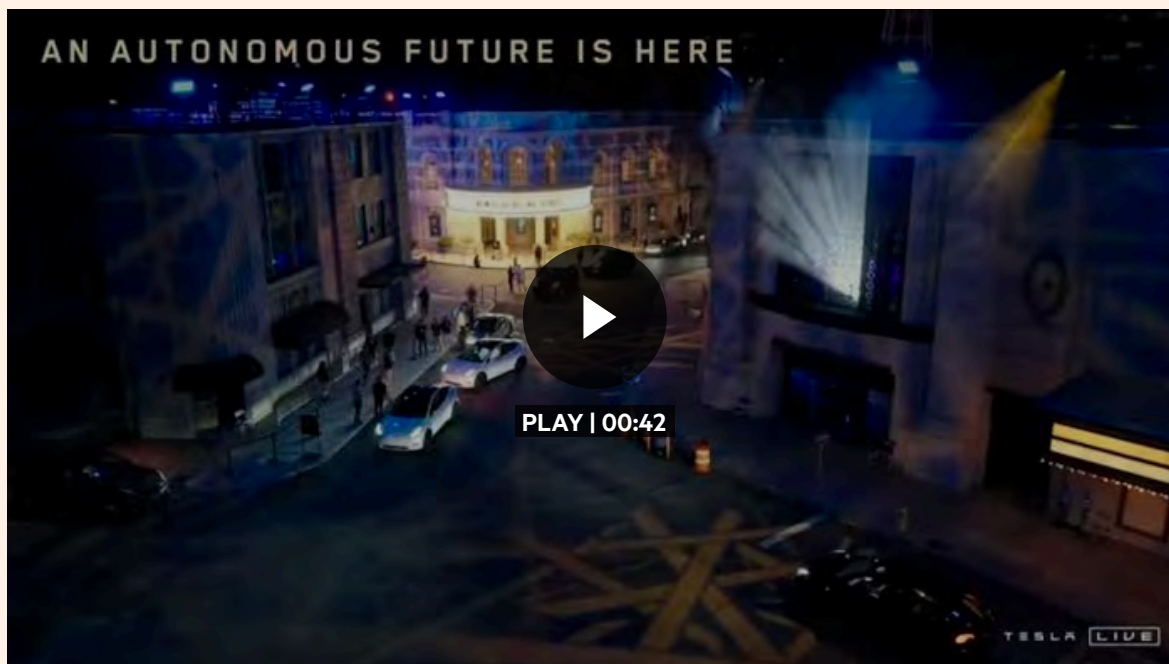
Tesla shares fell 8 per cent on Friday, wiping almost \$40bn from the carmaker's market valuation, after Elon Musk's much-hyped Robotaxi event disappointed investors with a lack of detail about a planned fleet of autonomous "Cybercabs".

The plunge in the stock left [Tesla](#) as the worst performer on the S&P 500. However, the group remains the most valuable car company in the world, with a market capitalisation of \$687bn.

Musk, the world's richest man, promised the new two-seated vehicle — without a steering wheel or pedals — would be available for less than \$30,000 and be in production by the end of 2026, if it secures regulatory approval.

But he did not provide details on the technology behind the robotaxis, nor on how he would bring down the cost of the self-driving vehicles.

“We found Tesla’s Robotaxi event to be underwhelming and stunningly absent on detail,” said Bernstein analyst Toni Sacconaghi. Information about “new products, offerings, and timeframes were absent, and product introductions were largely consistent with expectations”, he added.



Elon Musk unveils Tesla's 'Cybercab' robotaxis © Tesla



At the glitzy “We, Robot” event at Warner Bros Studios in Los Angeles on Thursday, [Musk](#) also unveiled a prototype for a 20-person Robovan and predicted that his group’s artificial intelligence-powered Optimus humanoid robot “buddies” would be “the biggest product ever of any kind” and cost less than \$30,000.

But the unveiling focused more on design, branding and Musk’s idiosyncratic vision of the future and less on the technology advances needed for Tesla to achieve it.

Following months of delay, Musk’s presentation started nearly an hour late and ended in less than 30 minutes, with Optimus robots dancing in glass gazebos and serving beer to investors.

While the robots moved with more fluidity than previous models, analysts at Morgan Stanley said they remained under human control. “It is our understanding that these robots were not operating entirely autonomously, but relied on tele-ops [human intervention] so it was more a demonstration of degrees of freedom and agility,” they said.

Tesla shares tumble on investor disappointment over robotaxis

Share price, \$



Source: LSEG via markets.ft.com

Jefferies analyst John Colantuoni described the event as “toothless” and predicted rivals such as Uber — which recently announced a partnership with Google’s self driving car unit, Waymo — would benefit as a result.

He added that “Tesla did not provide verifiable evidence of progress” towards the required technology, “which makes it difficult to assess feasibility of the targets outlined at the event”.

Uber stock rose 9 per cent on Friday, while rival ride-hailing app Lyft climbed 10 per cent.

Musk has said Tesla’s pivot to autonomous driving and AI could take its valuation as high as \$5tn, about seven times its current market value. The group’s shares had risen 45 per cent in anticipation of the unveiling since it announced the “robotaxi day” on April 5.

But the Tesla chief has repeatedly missed targets to roll out self-driving taxis. He first promised fully autonomous rides from Los Angeles to New York by the end of 2017. In 2019, he predicted that 1mn robotaxis would be on the road by the following year.

Another disappointment for investors was Musk's failure to unveil a more affordable electric vehicle, known unofficially as the Model 2, which will be priced at \$25,000, to revive its ageing product portfolio.

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<https://www.wsj.com/business/autos/tesla-robotaxis-reaction-autonomous-driving-05bdb3cc>

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Tesla's Robotaxi Event Disappoints Investors

Shares in the electric-car maker fall after much-hyped event was heavier on showbiz than financial details

By [Stephen Wilmot](#) [Follow](#)

Oct. 11, 2024 7:24 am ET



A screengrab from Tesla's debut of its Cybercab. PHOTO: TESLA

Wall Street's early reaction to Elon Musk's robotaxi reveal? Disappointment.

Shares in Tesla **TSLA -8.56% ▼** fell roughly 6% in premarket trading Friday following an event that was heavier on showbiz but lighter on business than investors had hoped after months of buildup. The overnight stock drop points to about a \$40 billion slump in the electric-car maker's valuation at the open.

Tesla on Thursday evening revealed a two-seat vehicle without a steering wheel or pedals at a tightly choreographed product launch in Los Angeles.

Following a strategic pivot toward robotics and autonomy this year, Musk had billed the event as Tesla's most significant since the launch of its benchmark-setting Model 3 in 2017. For investors, a move into robotaxis offers one way to

justify Tesla's \$763 billion market value. After a rally in the stock in anticipation of the event, Musk's company is worth almost three times as much as Toyota, the world's best-selling car maker.

"Investors we spoke to at the event thought the event was light of real numbers and timelines. These typically come at Tesla events. This one seemed focused on branding and marketing Tesla's vision," said Tom Narayan, an analyst at Royal Bank of Canada.

In a roughly half-hour presentation, Musk painted a picture of a green, sunny future in which autonomous vehicles eliminate parking lots and rush-hour traffic. Among the few concrete details were that Tesla's Cybercab would enter production in 2026 and sell for less than \$30,000.



Elon Musk billed the event as Tesla's most significant since the launch of the Model 3 in 2017. PHOTO: TESLA

To achieve those goals, Tesla will have to master two formidable technical challenges: cutting the production cost of electric vehicles, and making them drive themselves without human intervention to a safety level capable of satisfying risk-averse regulators. Musk didn't give his guests at the robotaxi event evidence of progress on either score.

The most advanced version of Tesla's current driver-automation software, which it calls "full-self driving (supervised)," requires the attention of a human driver as a backup. Musk said Thursday that an unsupervised version of FSD would be released in California and Texas next year. The Tesla chief executive has a decadelong record of missing such deadlines, leading to skepticism from analysts.

“Making the leap from where we are today to full autonomy (particularly through unsupervised vehicles with zero steering or pedals) is so gargantuan, technology-wise, that it feels overly ambitious in such a short period of time,” wrote Jessica Caldwell, head of insights at car-shopping site Edmunds.



The two-seat robotaxi doesn't have a steering wheel or pedals. PHOTO: TESLA

Those expecting hints about the progress of a lower-cost Tesla that does include a driving wheel and pedals were also left frustrated. The company still hasn't previewed the model, which Musk in July said would come out next year.

“We were disappointed by the lack of detail regarding Tesla's near-term product road map,” wrote CFRA analyst Garrett Nelson.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Videos

Tesla's robotaxi event was long on Musk promises. Investors wanted more details.

 [reuters.com/business/autos-transportation/tesla-robotaxi-event-was-long-promises-investors-wanted-more-details-2024-10-11](https://www.reuters.com/business/autos-transportation/tesla-robotaxi-event-was-long-promises-investors-wanted-more-details-2024-10-11)

Chris Kirkham



Tesla CEO and X owner Elon Musk rides in Tesla's robotaxi at an unveiling event in Los Angeles, California, U.S. October 10, 2024 in this still image taken from video.

Tesla/Handout via REUTERS Purchase Licensing Rights [↗](#), opens new tab

LOS ANGELES, Oct 11 (Reuters) - For a businessman who perpetually struggles with broken promises, Elon Musk gave himself quite a to-do list Thursday night at Tesla's (TSLA.O) [↗](#), opens new tab long-awaited Hollywood unveiling of its driverless robotaxis. His slew of announcements during a 20-minute presentation were short on practical details and prompted investors to push Tesla stock down as much as 10% on Friday.

After traversing the fake streets of the Warner Bros movie studio set in a sleek, silver two-door "Cybercab" prototype, he promised that the company's popular Model 3 and Model Y vehicles would be able to operate without driver supervision in California and Texas by next year.

Musk said the company would start building the fully autonomous Cybercab by 2026 at a price of less than \$30,000, and showed off a robovan capable of transporting 20 people around town - which he said would reshape cities by "turning parking lots into parks."

Later came the dancing humanoid robots that also mixed drinks at the bar, which Musk said Tesla will also eventually sell for \$20,000 to \$30,000 a piece. "I think this will be the biggest product ever, of any kind," he declared.

Thursday night's electronic dance music-infused event had the signature trappings of Musk's salesmanship, but some Tesla investors and experts said they were hoping for more concrete details on how the company plans to transform from an automaker into an autonomous driving and artificial intelligence titan with a solid business plan.

Tesla shares were down 7.8% in midday trading. The stock, which has been pummeled since its record high in late 2021 by fears of cheaper EV rivals eating into Tesla's market share, is up nearly 40% since April when Musk announced the shift to robotaxis. Still, shares

are down 9% over the past 12 months, compared with a nearly 33% increase in the broad-market S&P 500 index.

"His vision is lovely, but somebody has to actualize it," said Ross Gerber, a Tesla shareholder and CEO of Gerber Kawasaki Wealth and Investment Management. "For now, for the next 24 months, Tesla has to sell EVs. Why aren't we focused on that?"

Gerber said he was happy to see products like the Cybercab and the robovan, but hoped to also see a more traditional, lower-priced mass-market vehicle that the company could sell in the near future.

Musk had for years pledged to sell a car expected to start at about \$25,000, a promise that investors saw as critical to winning new customers. Reuters reported exclusively on April 5 that Tesla had abandoned this project, initially sending Tesla shares down.

Shares of ride-hailing firms Uber (UBER.N) [↗](#), opens new tab and Lyft (LYFT.O) [↗](#), opens new tab were up about 9% and 10% respectively, as analysts said the lack of details on Tesla's robotaxis eased competition worries for the companies.

'YEARS BEHIND'

Tesla is aiming to leapfrog incumbent self-driving players, including Alphabet's (GOOGL.O) [↗](#), opens new tab Waymo, by pursuing a lower-cost technological path that Musk believes will allow the company to scale up its autonomous vehicles far quicker than rivals.

Tesla's strategy is simpler and much cheaper than that of its rivals, but has critical weaknesses. Chief among those is that the AI technology underpinning its self-driving system makes it nearly impossible to pinpoint why a crash or other failure occurred - something that could concern regulators.

"Tesla software is at least years behind where Waymo is. That's the hard part. No flashy vehicle design is going to change that," said Matthew Wansley, professor at New York's Cardozo School of Law.

Tesla's rivals use similar AI and camera technology, but layer on so-called redundant systems and more-expensive sensors as a safety precaution.

Ramesh Poola, co-chief investment officer at Creative Planning, which holds Tesla shares, said he was impressed by the presentation but "obviously, we were looking for more details on what exactly his future plans are going to be and how he's going to monetize this new AI and robotics."

In particular, Poola said he anticipates regulators will pose a "major hurdle" to Musk's plans to shift to unsupervised autonomous driving by next year. Tesla's current "Full Self-Driving" driver-assistance feature cannot be operated safely without a human driver paying constant attention.

"He's shown the prototypes and definitely there's some excitement around it," Poola said. But widespread adoption of autonomous Cybercabs, where riders can hail rides through an Uber-style app, are still "maybe three to four years away," he said.

That is not necessarily a bad thing, Poola said, adding that he will be telling clients not to sell Tesla stock. "There are lots and lots of avenues to monetize this technology," he said. "Cybercab may not necessarily be next year, but down the road, the viability is there."

Musk had said he planned to operate a fleet of self-driving Tesla taxis that passengers can hail through an app. He made no mention of the app at Thursday's event.

Tasha Keeney, director of investment analysis at Tesla investor ARK Investment Management, said she had been hoping for more specifics on the app.

However, Keeney said she was encouraged by Musk's timeline of offering an unsupervised version of its full self-driving system in Texas and California next year.

"If they can do that, I don't see why they wouldn't launch a robotaxi service soon after," she said.

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Reporting by Chris Kirkham in Los Angeles; Additional reporting by Akash Sriram, Abhirup Roy and Deborah Sophia; Editing by Brian Thevenot, Sayantani Ghosh, Christopher Cushing and Rod Nickel

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Chris Kirkham
Thomson Reuters

Chris Kirkham is a business reporter in Los Angeles who has covered topics including tobacco, worker safety, internet privacy and corporate sustainability efforts. Chris previously worked at The Wall Street Journal and the Los Angeles Times.

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Lot of sci-fi smoke and mirrors: Investors, experts react to Tesla's robotaxi unveil

 [reuters.com/business/autos-transportation/lot-sci-fi-smoke-mirrors-investors-experts-react-teslas-robotaxi-unveil-2024-10-11](https://www.reuters.com/business/autos-transportation/lot-sci-fi-smoke-mirrors-investors-experts-react-teslas-robotaxi-unveil-2024-10-11)

Reuters



Tesla's robotaxi is displayed at an unveiling event in Los Angeles, California, U.S. October 10, 2024, in this still image taken from a video. Tesla/Handout via REUTERS Purchase Licensing Rights , opens new tab

Oct 11 (Reuters) - Tesla (TSLA.O) , opens new tab on Thursday showcased its long-awaited robotaxi with two gull-wing doors and no steering wheel or pedals, but the glitzy event was light on detail, disappointing investors who had hoped for more concrete plans. CEO Elon Musk, who has a record of missing projections - and himself said he tended to be optimistic with time frames - did not say how quickly Tesla could ramp up robotaxi production, clear inevitable regulatory hurdles or implement a business plan to leapfrog robotaxi rivals.

Below are comments from investors, stock market analysts and industry experts reacting to the robotaxi unveil:

MATTHEW WANSLEY, PROFESSOR AT NEW YORK'S CARDOZO SCHOOL OF LAW

"What Tesla showed tonight was a lot of sci-fi smoke and mirrors. What they haven't shown yet is software that has the capabilities of an automated driving system ... Musk has yet to prove that a vision-only approach for automation is viable. And he didn't address that issue tonight."

"The big open question about Tesla is just the software is so far behind where the rest of the industry is today."

BRYANT WALKER SMITH, LAW PROFESSOR, UNIVERSITY OF SOUTH CAROLINA

"Tesla yet again claimed it is a year or two away from actual automated driving - just as the company has been claiming for a decade. Indeed, Tesla's whole event had a 2014 vibe, except that in 2014 there were no automated vehicles actually deployed on public roads. Now there are real AVs carrying real people on real roads, but none of them are Teslas. Tonight did not change this reality; it only made the irony more glaring."

KC BOYCE, VICE PRESIDENT AT DATA ANALYTICS AND ADVISORY FIRM ESCALENT

"I had pretty low expectations for the event, given Tesla's history of overpromising and under-delivering. In that sense, it met my expectations: it was a typical Tesla announcement, full of hype and light on details. "

"The vision-only system Tesla has chosen handicaps their capabilities versus how Waymo and Cruise have chosen to approach autonomy. Despite that, Tesla has a potential advantage from its existing fleet and the 'vision' data available from that. Whether that data advantage is enough to close the sensor gap, I'm skeptical."

BRIAN MULBERRY, CLIENT PORTFOLIO MANAGER, ZACKS INVESTMENT MANAGEMENT

"When you're light on details the way that he (Musk) was, it's a little bit difficult to see what the measurable impact on earnings will be, at least in the near term."

"We're overall kind of lukewarm on the event because the lack of detail certainly is concerning. The lack of detail for us means we didn't get any more clarity. So in terms of robotaxi revenues positively adding to earnings per share, we're still seeing it's six, seven, eight years away. That's what we take away from this."

HANNAH YEE-FEN LIM, PROFESSOR, NANYANG TECHNOLOGICAL UNIVERSITY

"(The two-seater design) is not practical at all. The people who really need some sort of door-to-door service are maybe perhaps the elderly, the young, or those who cannot otherwise catch public transport. Just having that two seats, it's not going to work."

"But really, the two-seater design is probably the least of the problems, because the technology is really not quite there yet. If (Musk) is saying that now there's no radar and no lidar ... I don't think it can sense the surroundings properly, and if you cannot sense the

surrounding properly, no AI algorithm is going to help you drive that car safely."

COLIN LANGAN, ANALYST AT WELLS FARGO

"The Cybercab demos were conducted on a movie set in a well-controlled environment, and were very similar to a slow & short amusement park ride. Waymo is now hosting 100K rides per week in major cities, so we expected more from Tesla's demo."

CRIJN BOUMAN, CEO OF EV CHARGING SOLUTIONS FIRM ROCSYS

"The vehicle is one thing, but the other thing is the operation - how to run a profitable business ... The charging, the cleaning - all this stuff needs to be addressed."

"The fundamental thing about the robotaxi is that you want the vehicle to be available almost 24-7. Every time it spends charging, it's not making revenue, so it's not making the vehicle profitable. So you need to have fast charging, and (inductive charging) is typically for a low-power context so it will take hours and hours to charge, so I wonder if they have a fast-charging option."

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Reporting by Akash Sriram in Bengaluru; Compiled by Deborah Sophia and Rishi Kant; Editing by Anil D'Silva

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Podcast: The Robotaxi Verdict Is In—And Wall Street Is Taking the Train

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Oct. 11, 2024, 9:03 AM PDT



Reyhan Harmanci

Bloomberg Editorial



By Reyhan Harmanci

(Bloomberg Businessweek) --

Photo Illustration by 731. Photos: NASA (1), Bloomberg (1), Getty Images (7)

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Omny Studio: The Robotaxi Verdict Is In - Elon, Inc.

It was a late night for Tesla fans, investors and journalists as the much-discussed unveiling of Elon Musk's "cybercab" (or is it "robotaxi?") was significantly delayed from its scheduled 10 pm ET start (not unlike two famously glitchy online events involving Donald Trump and Ron DeSantis Musk previously attempted on his social media platform). But while the aesthetics of the vehicle got some rave reviews, details on production of a new wave of autonomous vehicles—let alone their potential deployment—were scant.

Wall Street was not impressed. Tesla stock fell as much as 10% when trading opened Friday. To get a quick round-up of thoughts, *Elon, Inc.* host David Papadopoulos jumped into the studio with Bloomberg editor Craig Trudell to discuss.

About the show: Each week, listen in as host David Papadopoulos (and sometimes Max Chafkin) convenes a panel of Bloomberg journalists tracking Elon Musk's companies and the surprising ways they intersect, breaking down his latest moves and what they could mean for us all.

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<https://www.wsj.com/business/autos/tesla-robotaxi-event-highlights-8063115a>

BUSINESS | AUTOS

Five Takeaways From Tesla's Robotaxi Show

Elon Musk says Tesla will start making driverless Cybercab by 2027

By [Sean McLain](#) [Follow](#)

Oct. 11, 2024 1:31 am ET

Tesla **TSLA -8.25%** ▼ Chief Executive Elon Musk revealed a long-awaited autonomous vehicle at an event held at Warner Bros. studios in Burbank, Calif. late Thursday.

The company's first driverless vehicle marks a strategic pivot for the electric-vehicle pioneer, as Tesla seeks to derive much of its future business from robotics and artificial intelligence.

The stakes are high for Tesla, because its core business of making and selling EVs has been under pressure amid slack buyer demand and increased competition.

Musk laid out a utopian vision of the future, one in which autonomous cars dramatically reduce traffic fatalities and a vehicle becomes "a comfortable little lounge" where the owner can relax or work.

Here are some key takeaways from the event.

A futuristic Cybercab

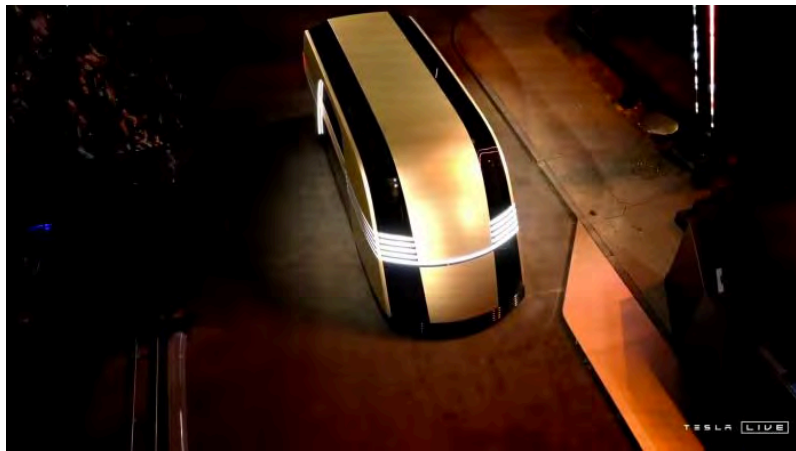
The public got their first look at Tesla's newest model, the Cybercab, which Musk has portrayed as the company's most significant milestone since the introduction of the Model 3 in 2017.

The car is reminiscent of Tesla's Model Y SUV, with a more boxy rear and doors that flip upward. Musk said the company would begin manufacturing Cybercabs before 2027, acknowledging that he tends to be optimistic on timelines.

The vehicles will form the backbone of a new business, shuttling passengers autonomously, and will compete with services like Alphabet's Waymo and General Motors' Cruise, but also ride-sharing titans Uber and Lyft.

Musk has portrayed the launch of driverless vehicles as central to Tesla's future success and valuation. He has said robots and self-driving cars could push Tesla's market value to at least \$30 trillion, or nearly 40 times the current level.

Tesla also showed off a larger, shuttle-like driverless vehicle, dubbed the Robovan, that can carry up to 20 people.



The Robovan was also launched at the event. PHOTO: TESLA

Tesla's cheapest car

Musk said anybody will be able to purchase the two-seater Cybercab for less than \$30,000. If so, that would be a fraction of the cost of vehicles from market leader Waymo, according to analyst estimates. Musk has portrayed the cost of Tesla's autonomous-driving technology, which uses camera images and artificial intelligence, as a key competitive advantage.

The price was designed to make them affordable for people who want to start a taxi service. "We imagine someone will have 20 of them and tend them like a shepherd," Musk said.

Musk claimed that the operating cost of a Cybercab and Robovan made them cheaper to operate than a bus.

A cab—for private owners

Tesla has long said that the carmaker's investments in self-driving technology would one day allow owners to convert their vehicles into autonomous taxis, earning them money.

On Thursday, Musk said Tesla would deploy a "fully autonomous" version of its driver-assistance system, called Full Self Driving, in Texas and California next year. The software would run on Model 3 sedans and Model Y SUVs, although it wasn't immediately clear when customers would have access to this technology.

In the future, he said the company would roll out the service in states and countries where permitted by regulators.

Musk reiterated his view that a self-driving Tesla can help make the company's vehicles more affordable, by allowing owners to rent out their car when they are not using them.

"Your average passenger car is only used 10 hours a week," Musk said. "If they are autonomous they could be used five times more, maybe 10 times more."

Unanswered questions

Musk provided few new details about Tesla's business model for driverless taxis, such as projections for revenue or market size.

In the past, Musk has compared the robotaxi business to a combination of Uber and Airbnb, where Tesla would operate its own vehicles and take a cut of rides taken in privately-owned Teslas.

Musk didn't go into detail about how Tesla would manage the regulatory hurdles of putting driverless cars on the road saying only that the company would offer the service where it was allowed. Some high-profile accidents involving self-driving cars have led regulators to scrutinize companies operating these vehicles.

'An age of abundance'

Musk put the Cybercab at the center of an idyllic vision of the future, one in which robots not only drive people around but perform many other tasks. He

hypothesized that an army of android helpers would push down the cost of goods and usher in “an age of abundance.”

The Tesla chief has spoken frequently over the past year about the need for a hopeful vision for humanity's future.

“I love Bladerunner, but I don't know if we want that future,” Musk said in reference to the dystopian sci-fi film franchise. “We want to have a fun, exciting future.”

Musk said he hopes to sell billions of these robots, which he compared with R2-D2 and C-3PO, characters in the Star Wars films.

At the end of the event, a phalanx of Tesla's Optimus humanoid robots walked through the crowd, danced on an elevated stage and served drinks to attendees.



A screengrab of Tesla's Optimus robots. PHOTO: TESLA

Write to Sean McLain at sean.mclain@wsj.com

Videos

Warren, Whitehouse Slam Watchdog's Oversight of Audit Quality

By Andrea Vittorio

Documents

 [Warren and Whitehouse letter](#)

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- Democratic senators press PCAOB on high audit flaw rates
 - Lawmakers question board's role as industry watchdog

Bloomberg Law News 2024-10-11T09:59:49858907615-04:00

Warren, Whitehouse Slam Watchdog's Oversight of Audit Quality

By Andrea Vittorio 2024-10-10T16:56:33000-04:00

- Democratic senators press PCAOB on high audit flaw rates
- Lawmakers question board's role as industry watchdog

The US audit industry watchdog is under fire from Democratic Sens. Elizabeth Warren and Sheldon Whitehouse for allowing what they called an "embarrassing" batch of firm inspection results.

The Public Company Accounting Oversight Board found flaws in almost half of the audits it reviewed last year at accounting firms that are under its purview. The board is tasked with overseeing the firms that are hired to vet public companies' financial statements.

"The findings of the review cast doubt upon the agency's ability to do its job," Warren (D-Mass.) and Whitehouse (D-R.I.) wrote in a Wednesday letter to PCAOB Chair Erica Williams. The lawmakers are both members of the Senate Finance Committee.

Their letter noted it's not the first time they've raised concerns about the watchdog's effectiveness and its ability to help protect public company investors. Warren and Whitehouse pressed Williams to respond with details on how the board is holding auditors accountable for ongoing problems. They also asked how newly approved audit standards will help address quality concerns.

A PCAOB spokesperson said the board appreciates the letter and will respond directly to the senators.

"We share the same commitment to quality audits, and we will continue to work with them on our shared goal of protecting investors," the spokesperson said.

Enforcement Strategy

In the most recent round of inspections for 2023, smaller firms struggled with US audit standards compliance more than larger firms.

For instance, the regulator found flaws in about one-quarter of audits inspected at the four biggest US accounting firms—Deloitte, Ernst & Young, KPMG, and PwC—and in more than half of Grant Thornton's inspected audits.

Warren and Whitehouse called out BDO's results in particular. Inspectors reported flaws in almost 90% of the BDO audits they reviewed in 2023, an increase from the year before. The firm has trimmed its audit client list as part of an effort to repair its lagging track record.

The senators questioned why the PCAOB hasn't barred BDO from auditing public companies and asked whether investors can have confidence in the quality of the firm's audits.

Their letter also criticized the board's enforcement strategy, suggesting a \$2 million fine the board levied against BDO last year is "a drop in the bucket" compared to the firm's \$2.8 billion in US revenues for 2023.

Under Williams's leadership, the board has brought a record number of enforcement cases and issued record-breaking financial penalties over issues such as firms cheating on training exams.

— With assistance from Amanda Iacone.

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Ohio Seeks To Halt Depositions In FirstEnergy Investor Suit

By **Ryan Harroff**

Law360 (October 10, 2024, 6:49 PM EDT) -- The state of Ohio wants to halt certain depositions and other discovery in a securities suit stemming from the FirstEnergy bribery scandal, saying it could interfere with criminal charges against two of the utility company's former executives, according to an intervenor motion filed Thursday.

The **certified class of investors** have requested depositions and other information connected to criminal proceedings against Charles Jones and Michael Dowling, FirstEnergy's former CEO and vice president of external affairs, respectively, currently pending in the Summit County Court of Common Pleas. However, fulfilling those requests would hamper the prosecution of the indictment against the duo, according to the state.

Ohio asserted in its motion that a limited stay of discovery is warranted to protect the documents and depositions the class requested. The requested items include all discovery items from the criminal proceedings and the depositions of multiple witnesses the prosecutors put forward, according to the motion.

Jones, Dowling and the class have consented to Ohio's limited intervention to seek the discovery stay, if not the stay itself, according to the motion. However, regardless of their consent, the state said the court should still grant the limited intervention and discovery stay to prevent interference with the criminal matter.

"Although counsel for lead plaintiffs and counsel for Jones and Dowling are likely to object and assert prejudice, the state submits that any prejudice caused by staying discovery in a federal civil case for monetary damages should not outweigh the damage caused by allowing federal civil litigants to interfere with an ongoing state criminal prosecution," Ohio argued.

Additionally, Ohio argued that it would be in the court and plaintiffs best interest to wait for Jones and Dowling's criminal proceedings to resolve rather than seek depositions and documents related to them now. Once the criminal case is over, the state court's protective order will no longer be in place, and more complete responses to discovery requests will be on the table, according to the motion.

A fully developed record from the criminal proceedings could "streamline" the civil litigation by resolving certain matters regarding Jones and Dowling, according to the motion.

The criminal proceedings against Jones and Dowling relate to a \$4.3 million bribe they allegedly paid to Samuel Randazzo, the former chairman of the Public Utilities Commission of Ohio who **died by apparent suicide** in April, as charges against him and his co-conspirators in the FirstEnergy nuclear energy bailout scandal mounted. Those co-conspirators included former speaker of the Ohio House of Representatives Larry Householder, who received **20 years in prison** in March 2023.

If you are experiencing thoughts of suicide, the Suicide and Crisis Lifeline is available 24 hours a day at 988 or online at 988lifeline.org.

FirstEnergy recently lost its bid to block certain discovery requests in the investors' class action after

the court **refused to certify** the company's Sixth Circuit appeal on its decision to not shield the company's documents on its internal investigation into the bribery scheme it **admitted to running** with Householder.

A representative for the Ohio Attorney General's Office declined to comment, stating that the intervention bid "speaks for itself."

Counsel for the class, FirstEnergy, Jones and Dowling did not immediately respond to requests for comment.

The class is represented by Darren Robbins and Mark Solomon of Robbins Geller Rudman & Dowd LLP and Joseph Murray of Murray Murphy Moul + Basil LLP.

FirstEnergy is represented by Robert J. Giuffra Jr., Sharon Nelles, David Rein and Nicholas Menillo of Sullivan & Cromwell LLP and Paul Schumacher and Richard Silk of Dickie McCamey & Chilcote PC.

Jones is represented by Carole Rendon, Daniel Warren, Douglas Shively, Jeremy Steven Dunnaback, Rachael Israel, Albert Lin and George Stamboulidis of BakerHostetler and William Scherman and Jennifer Mansh of Vinson & Elkins LLP.

Dowling is represented by John McCaffrey, John Favret and Hannah Smith of Tucker Ellis LLP and Dan Webb, Steven Grimes and A. Matthew Durkin of Winston & Strawn LLP.

The cases are In re: FirstEnergy Corp. Securities Litigation, case number 2:20-cv-03785, in the U.S. District Court for the Southern District of Ohio and State of Ohio v. Dowling et al., case No. 2024-02-0473, in the Summit County Court of Common Pleas.

--Additional reporting by Lauren Berg and Jessica Corso. Editing by Drashti Mehta.

Update: This article has been updated to include additional counsel information and to clarify a detail on FirstEnergy's appeal.



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Social Media Apps Don't Need User Warnings, MDL Judge Told

By **Rachel Scharf**

Law360, Los Angeles (October 10, 2024, 9:58 PM EDT) -- A lawyer for TikTok urged a California state judge on Thursday to cut failure-to-warn claims from multidistrict litigation over social media's alleged effects on youth mental health, saying this theory is akin to suing newspapers for "not including a warning that reading the news could put you in a bad mood."

The arguments came during oral arguments before Los Angeles Superior Court Judge Carolyn B. Kuhl, who is presiding over **consolidated claims** that the addictive properties of TikTok, Meta Platforms, YouTube and Snap Inc. are fueling a childhood mental health crisis.

The social media companies asked Thursday to trim seven of the consolidated complaints that allege apps should include user warnings about their potential effects on mental health. David Mattern of King & Spalding LLP, who represents TikTok, said this sort of product liability claim cannot be applied to a service that offers a "unique tailored experience to each user."

"Under plaintiffs' theory, any platform could be sued for the same broad and unspecified risk of harm," Mattern told Judge Kuhl. "For example, you could sue a newspaper for not including a warning that reading the news could put you in a bad mood."

Mattern also said these claims are barred by the First Amendment and Section 230 of the Communications Decency Act. He pointed to the Ninth Circuit's **recent decision** in X Corp. v. Rob Bonta, which struck down parts of a California law requiring social media giants to disclose their content-moderation policies.

"Bonta has already resolved this issue," said Mattern.

A lawyer for the plaintiffs, Adam Davis of Wagstaff & Cartmell LLP, countered that California law allows for failure-to-warn claims even when there is not a physical product at issue. He cited cases where courts found drivers have a duty to honk when they see a hazard on the road, and that golfers must warn fellow players of their wayward shots.

Davis said that just because this doctrine has not yet been applied in the social media context does not mean it cannot be.

"That's how the law works: you apply existing principles to new facts," Davis told Judge Kuhl.

The judge took the matter under submission and said a ruling will be forthcoming.

Thursday's hearing also featured a lengthy discussion about the status of document discovery, which is scheduled to conclude on Oct. 28. Plaintiffs' attorney Emily Jeffcott of Morgan & Morgan PA complained that the social media companies have "slow-played their productions," hindering an upcoming deposition timeline.

A lawyer for Meta, Isaac Chaput of Covington & Burling LLP, said their team needs at least 13 more weeks to translate mountains of technical data regarding app notifications into something "human-readable." This appeared to frustrate Judge Kuhl, who raised the specter of sanctions.

"You're going to need to go back to your client, and you're going to need to come up with some way

to do this or some alternative that is going to satisfy the needs of the plaintiffs," said the judge.

"Your honor, I am telling you that is physically impossible," responded Chaput.

"Then the effect of this is essentially to throw a monkey wrench into the middle of the trial planning, and that's not going to go down without cost," warned Judge Kuhl.

The Los Angeles Superior Court multidistrict litigation has a **parallel federal proceeding** pending in the U.S. District Court for the Northern District of California, where parents, school districts and dozens of state attorneys general similarly claim social media companies deliberately make children habitual users to the detriment of their mental health.

A coalition of attorneys general also brought **new youth addiction and fraud claims** against TikTok this week.

Lawyers for the various parties declined to comment as they exited the courtroom Thursday.

The plaintiffs are represented by Paul R. Kiesel, Mariana A. McConnell and Cherisse H. Cleofe of Kiesel Law LLP, Emily C. Jeffcott of Morgan & Morgan PA, Brian J. Panish, Rahul Ravipudi and Jesse Creed of Panish Shea Ravipudi LLP, Joseph G. VanZandt and Davis S. Vaughn of Beasley Allen Crow Methvin Portis & Miles PC, Christopher L. Ayers of Seeger Weiss LLP, Matthew Bergman and Laura Marquez-Garret of the Social Media Victims Law Center, Brooks Cutter of Cutter Law PC, Thomas P. Cartmell and Adam S. Davis of Wagstaff & Cartmell LLP, Amy Eskin of Schneider Wallace Cottrell Konecky LLP, Kirk Goza of Goza & Honnold LLC, Rachel Lanier of The Lanier Law Firm PC, Sin-Ting Mary Liu of Aylstock Witkin Kreis & Overholtz PLLC, Marc J. Mandich of Southern Med Law, Kelly McNabb of Lieff Cabraser Heimann & Bernstein LLP, Jonathan D. Orent of Motley Rice LLC, Ruth Rizkalla of The Carson Law Firm PC, Frederick Schenk of Casey Gerry Schenk Francavilla Blatt & Penfield LLP, Dean Kawamoto of Keller Rohrbach LLP and James P. Frantz of Frantz Law Group.

Meta is represented by Ashley M. Simonsen, Emily Johnson Henn, Phyllis A. Jones, Paul W. Schmidt, Michael X. Imbroscio, Isaac D. Chaput, Mark W. Mosier and Alexander L. Schultz of Covington & Burling LLP.

Snap is represented by Jonathan H. Blavin, Rose L. Ehler, Victoria A. Degtyareva, Lauren A. Bell and Ariel T. Teshuva of Munger Tolles & Olson LLP.

YouTube is represented by Christopher C. Chiou, Matthew K. Donohue, Samantha Machock, Lauren Gallo White and Brian M. Willen of Wilson Sonsini Goodrich & Rosati LLP, Joseph G. Petrosinelli and Ashley W. Hardin of Williams & Connolly LLP and Yarden R. Zwang-Weissman, Brian Ercole and Stephanie Schuster of Morgan Lewis & Bockius LLP.

TikTok is represented by Matthew J. Blaschke, Albert Q. Giang, Geoffrey Drake, David P. Mattern and Bailey J. Langner of King & Spalding LLP and Tarifa B. Laddon, Andrea R. Pierson, Andrew L. Campbell and David P. Koller of Faegre Drinker Biddle & Reath LLP.

The consolidated case is Social Media Cases, JCCP5255, in the Superior Court of the State of California, County of Los Angeles.

--Additional reporting by Lauren Berg and Dorothy Atkins. Editing by Vaqas Asghar.



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Rosen, Rigrodsky Law To Lead Coupang IPO Derivative Suit

By **Emilie Ruscoe**

Law360 (October 10, 2024, 10:24 PM EDT) -- The Rosen Law Firm PA and Rigrodsky Law PA will represent investors in a consolidated derivative action against brass at South Korean e-commerce company Coupang Inc. over alleged misrepresentations about its labor practices ahead of its \$3.5 billion initial public offering.

In a Thursday **order**, U.S. District Judge Vernon S. Broderick appointed the firms as co-lead counsel in the action and consolidated three derivative suits against Coupang executives, saying that doing so would promote judicial convenience and economy.

"Although the complaints are not identical, they all share common questions of law and fact, including whether each officer defendant made materially false or misleading statements, and, if so, whether the officer made such statements with a legally culpable state of mind," Judge Broderick said.

In the first-filed derivative action, Coupang investor Kia Tang took aim at officers and directors of the company with claims that they'd misled investors in filings for its March 2021 IPO.

Tang described Coupang as South Korea's Amazon and said the company went public after seeing "explosive growth," during the global coronavirus pandemic.

According to Tang, the company saw trading prices for its shares drop a dozen times during its first year as a public company in connection with alleged revelations about its business practices.

Among other things, Tang cited reports about a June 2021 fire at one of the company's fulfillment centers and the results of a subsequent investigation that found hundreds of defects with the facility's fire safety system. Coupang's leadership had hidden that Coupang's fulfillment centers hadn't followed basic fire safety measures, Tang said.

Tang alleged that Coupang's representatives concealed from investors that, among other things, labor conditions for its frontline workers were unsafe.

She also alleged the company misappropriated protected trade content from its merchants to maximize commissions it earned on third-party sales, which its investors were also allegedly kept in the dark about.

By the time Tang filed suit in August 2022 trading prices for the company's shares had fallen to \$18, down significantly from the \$35 per share investors paid for Coupang shares during the company's IPO.

Representatives for the parties did not immediately respond to requests for comment Thursday.

The plaintiffs are represented by Laurence M. Rosen and Phillip Kim of The Rosen Law Firm PA and the Rigrodsky Law Firm PA.

The Coupang defendants are represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Kia Tang v. Bom Suk Kim et al., case number 1:23-cv-07239, in the U.S. District Court for

the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Dave Trumbore.

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Chancery OKs \$9.5M Deal For Katapult SPAC Challenge

By **Jeff Montgomery**

Law360 (October 10, 2024, 8:46 PM EDT) -- A \$9.5 million deal settled a Delaware Court of Chancery stockholder suit Thursday seeking damages arising from a stock slump following the \$883 million blank check company deal that took subprime consumer lender Katapult Holdings Inc. public in June 2021.

Vice Chancellor Paul A. Fioravanti Jr. approved the agreement along with earmarking \$1.6 million for attorney fees after observing that the request fell within a "range of reasonableness" and remarking that the claims "fit the mold" of special purpose acquisition company cases.

"SPAC cases are reasonably complex, and with none having gone to trial and judgment, these factors support the fee request," the vice chancellor said.

Named in the suit were SPAC sponsor FinServ Holdings LLC and five directors and officers of the take-public venture, including CEO Lee Einbinder and Chief Financial Officer Howard Kurz, both of whom were deemed FinServ Acquisition Corp.'s controllers.

The stockholder class alleged direct claims for breaches of fiduciary duties by the officers, directors and controlling individuals as well as unjust enrichment against the sponsor and directors.

David B. Sborz of Andrews & Springer LLC, counsel to the class, told the vice chancellor that a proxy statement issued in support of the take-public merger "failed to disclose the financial interest of the supporting directors and their beneficial interest in founder shares" that converted to 20% of the post-merger entity's outstanding shares upon closing on a merger.

Without a deal, however, the founder shares would be worthless, creating what class attorneys described as a conflicted drive to complete any deal, a fact that the suit said went undisclosed in the run-up to closing on Katapult.

Katapult's business focuses on lining up credit for "non-prime" consumers not deemed eligible for top-tier lenders, and it operates under "waterfall" terms that give it the first crack at lining up credit for otherwise rejected borrowers.

According to the complaint, FinServ's principals failed to disclose risks that prime lenders would extend credit to more marginal borrowers, depending on economic conditions, undermining Katapult's revenues.

The suit claimed that, at trial, attorneys for the class would show that those named acted on "misaligned" incentives that put a priority on their own interests in closing a deal and securing the best price for their founder shares.

"The COVID-19 pandemic drastically shortened defendants' timeline to close a de-SPAC transaction," FinServ Acquisition's brief in support of the settlement said. "The controller defendants pressured the board, which hastily approved the acquisition of legacy Katapult after a perfunctory process with minimal input from advisors."

Katapult's financial conditions deteriorated between signing and closing, according to the class' attorneys. But "to minimize redemptions, defendants concealed this fact from FinServ stockholders,

along with other material information, including the board's interest in the founder shares."

The two sides settled the case before trial after negotiations supervised by mediator Michelle Yoshida of Phillips ADR.

"We continue to believe that the defendants would have struggled to prove fair dealing," Sborz said, noting later that "calculating damages in this particular context remains unknown. Traditional evaluation methods would not have been reliable here as a result of this company being 'pre-revenue,' with no history."

A calculation based on a \$7.58-per-share price for 25 million shares would yield a potential damage recovery of \$60 million, he said, with the \$9.5 million settlement reflecting a 15.7% recovery.

The settlement calls for \$6.725 million to be paid in cash and \$2.725 million to be delivered in the form of freely tradable Katapult shares.

Vice Chancellor Fioravanti noted that "it's difficult to gauge the strength of these claims beyond a motion to dismiss. There are no documents produced or depositions beyond the time of settlement."

The vice chancellor referred at one point to a pair of de-SPAC class suit rulings by Vice Chancellor Lori W. Will, who on Wednesday approved pretrial settlements and attorney fees for two GigCapital-related blank check deals. The rulings authorized combined public stockholder payouts and fee awards of \$7.25 million and \$2.5 million.

One of the GigCapital cases settled for 18% of the potential damages before the start of discovery, while the other awarded 13% at an earlier stage. Those results indicated that attorney fee request in Katapult's case, at 17.2%, was in the range of reasonableness, the vice chancellor said.

The stockholders are represented by Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach, Christopher P. Quinn, Jackson E. Warren and Jacob D. Jeifa of Andrews & Springer PA and Gregory V. Varallo, Mae Oberste, Daniel E. Meyer, Jeroen van Kwawegen and Thomas G. James of Bernstein Litowitz Berger & Grossmann LLP.

FinServ and the directors and officers are represented by D. McKinley Measley and Alexandra M. Cumings of Morris Nichols Arsht & Tunnell LLP and Koji Fukumura, Aric H. Wu and Brian M. French of Cooley LLP.

The case is In re: FinServ Acquisition Corp. SPAC Litigation, case number 2022-0755, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera. Editing by Adam LoBelia.



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Chancery OKs \$125M Deal, Fees In Discovery Merger Suit

By **Jeff Montgomery**

Law360 (October 10, 2024, 6:28 PM EDT) -- Declaring it "a great settlement," a Delaware vice chancellor approved on Thursday a near chart-topping, \$125 million deal to end stockholder challenges to Discovery Inc.'s \$43 billion merger with AT&T in 2022, an amount eclipsed only by a \$148.2 million pretrial deal in a 2016 case.

Vice Chancellor J. Travis Laster approved the deal, including a \$24.5 million attorney fee and \$5,000 incentive award to each of four lead stockholders, with few questions and multiple kudos.

"You guys were, as far as I was concerned, straight down the middle," with the attorney fee total, the vice chancellor said, noting that the "outcome was reached after both sides had extensive information, with the assistance of a very skilled mediator."

The suit alleged breaches of fiduciary duty in the run-up to the 2021 mega-merger of Discovery Inc. and AT&T's WarnerMedia business, which created Warner Brothers Discovery Inc.

While attorneys for the class said in a supporting brief that they believed that the case could settle for between \$100 million and \$300 million, they settled on \$125 million based on a risk that the court also could reject any payout.

The only larger class settlement approved at a similar stage in Court of Chancery history was a \$148 million agreement that ended in 2016 a class suit challenging the sale of Dole Food Co.

"I think it's one of the largest class settlements of all time. There's not a lot of nine-figure settlements in this court, despite the perception of some commentators," said Ned Weinberger of Labaton Keller Sucharow LLP, counsel to the class.

Weinberger told the vice chancellor that Discovery potentially involved "legitimate questions about the standard of review" for judging the claims and concerns over risks during trial and appellate review.

An alleged breach of Discovery's charter, Weinberger said, was a "potential kill shot," leaving no defenses that could invalidate the claims.

Although a brief in support of the settlement said that class attorneys suspected duty breaches by "various fiduciaries," a books and records demand and investigation focused the case on a side deal lined up by large discovery stockholder and controller Advance/Newhouse Partnership and Advance/Newhouse Programming Partnership, referred to in the case as A/N.

"I think we leveraged that claim pretty effectively," Weinberger said.

Under the agreement, \$100 million must be paid by Advance/Newhouse Partnership and Advance/Newhouse Programming Partnership and \$12.5 million apiece by Robert Miron, the now-retired chairman of Advance/Newhouse Communications, and his son, Steven Miron, A/N Partnership's CEO.

Steven Miron stepped down from his director role at Warner in April after the U.S. Department of Justice's announcement that it was investigating whether his service on the board of Warner Bros.

Discovery and that of Steven Newhouse violated Section 8 of the Clayton Antitrust Act.

Two groups of shareholders led by The Bricklayers Pension Fund of Western Pennsylvania and Monroe County Employees' Retirement System filed back-to-back complaints over the merger in December 2022, alleging company insiders made off with \$1 billion in side deals and "staggering" compensation packages at the expense of public stockholders.

Attorneys for former Discovery stockholders and the company notified Vice Chancellor Laster in June that a deal had been reached to end the case, pending agreement on final terms. The tentative agreement followed a settlement recommendation in May from former federal judge and mediator Layn R. Phillips.

In a brief filed ahead of the hearing, the stockholders reported that the most-realistic outcome was an award ranging between \$100 million and \$300 million, with an upper end of \$500 million.

"Pricing in the probability that the Court would award no damages — because the business judgment rule applied or because the side deal was entirely fair — Plaintiffs determined that the \$125 million settlement compared favorably to the case's expected value."

In a settlement brief, attorneys for the stockholders "alleged that the charter prevented A/N from extracting differential consideration, but if A/N nonetheless intended to seek a premium for relinquishing its Special Rights, it should have recused its designees from the broader merger deliberations upfront and negotiated with an independent special committee."

A/N also knew, the brief said, "that negotiations with AT&T focused on the relative post-closing ownership percentages of Discovery's and AT&T's respective shareholders, meaning that any premium for A/N would come directly from other Discovery stockholders."

Counsel for Advance/Newhouse and others named in the suit did not comment on the settlement.

Co-lead plaintiff Bricklayers Pension Fund of Western Pennsylvania is represented by Ned Weinberger, Brendan W. Sullivan, Jiahui (Rose) Wang, Domenico Minerva, John Vielandi and Joshua M. Glasser of Labaton Keller Sucharow LLP.

All class members are represented by Gregory V. Varallo, Andrew E. Blumberg and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP.

Key West Police and Firefighters' Pension Fund is represented by Jeroen van Kwawegen of Bernstein Litowitz PC.

City Pension Fund for Firefighters & Police Officers in the City of Pembroke Pines is represented by Lee D. Rudy, J. Daniel Albert, Grant D. Goodhart, Kevin M. Kennedy and Cameron N. Campbell of Kessler Topaz Meltzer & Check LLP and Robert D. Klausner of Klausner Kaufman Jensen & Levinson.

Steve Silverman is represented by Jeremy Friedman, David Tejtzel and Christopher M. Windover of Friedman Oster & Tejtzel PLLC and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

The case is *In re Warner Bros. Discovery Inc. Stockholders Litigation*, case number 2022-1114, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Cos. Face Increasing Risk From Environmental Citizen Suits

By **J. Michael Showalter and Bradley Rochlen** (October 10, 2024, 6:04 PM EDT)

Traditionally, the U.S. government does not regulate waste, except through tort theories of liability like trespass and nuisance. The primary federal statutes focused on waste deal only with defined types of waste.

These include hazardous substances listed under the Comprehensive Environmental Response, Compensation and Liability Act — also known as the Superfund law — and certain kinds of waste management units, or wastes that "may pose imminent and substantial endangerment" under the Resource Conservation and Recovery Act.

Importantly, no federal laws focused on waste are concentrated on consumer goods waste, or push businesses toward sustainability. But litigation is coming to fill this vacuum.

For example, **litigation was filed** by the California attorney general on Sept. 23 against Exxon Mobil Corp. seeking billions of dollars and alleging that Exxon actively encouraged the belief that plastics could be recycled. The litigation seeks establishment of an abatement fund to address issues related to plastic waste disposed into the environment.

Environmental nongovernmental organizations may soon file similar litigation. NGOs push their agenda by lobbying, direct public pressure and citizen suits in which groups step into the shoes of governmental regulators. NGOs' efforts often serve to focus attention on areas where traditional environmental regulation is either nascent or incomplete.



J. Michael Showalter



Bradley Rochlen

Citizen Suit Basics

Citizen suits have been fundamental to environmental enforcement for decades. Citizen suit provisions were drafted in the 1970s, when Congress passed laws allowing private parties to bring citizen suits to enforce federal environmental laws.

While those statutes have not significantly been amended, changes in both administrative law and the social landscape mean that today's citizen suits are different from those envisioned 50 years ago.

Citizen suits typically begin with private parties sending notice letters to potential defendants, apprising them that if they do not take a specified action within a certain period of time, the private entity will initiate litigation. One important goal of these letters is to allow parties to fix issues outlined in the letters, outside of litigation.

But sometimes notice letters do not have their desired effect. Assuming the issues are not addressed outside of litigation — typically through a specific type of settlement with state or federal regulators, the particulars of which are generally provided by statute — the private party may file suit to address the claimed harms.

Generally, parties that can demonstrate an environmental statute has been violated will seek attorney fees and costs. The battle over fees and costs can be complicated, with parties litigating

issues ranging from the total numbers of hours expended to the nature of relief achieved.

The Evolving Procedural Landscape

Over the past 15 years, American environmental enforcement has shifted from fairly straightforward statute-based, command-and-control procedures to situations where varying parties — including all levels of government, companies and trade associations, and a host of NGOs — engage in a myriad of procedures ranging from familiar to exotic, in pursuit of often conflicting environmental priorities.

Equitable concerns and issues of environmental justice have also generated increased focus from both regulators and the broader community. And recent U.S. Supreme Court precedent has the potential to further alter the citizen suit landscape.

Loper Bright and Agency Deference

Defendants caught up in citizen suits historically have used prior agency decisions — which had been deferred to under the doctrine of Chevron deference — as part of their defense strategies.

These mechanisms were used to enforce the law, but not to shape or change it. Private parties were not permitted to use plain meanings of statutes to collaterally attack decisions by state or federal regulators.

The Supreme Court's recent decision in *Loper Bright v. Raimondo* may alter the balance between citizen suit plaintiffs and defendants, by displacing agencies from their primary role in interpreting the statutes they administer. It may become more difficult for citizen suit defendants to argue that private parties are abusing the citizen suit mechanism by collaterally attacking regulatory decisions.

Corner Post and Regulatory Finality

Similarly, the court's recent decision in *Corner Post v. Board of Governors of the Federal Reserve System* has the potential to reshape the regulatory landscape by limiting the concept of regulatory finality.

In the past, courts have held that citizen suits exist to enforce the law, not to change it. But given that the Supreme Court has now sanctioned reopening certain categories of regulations based on when individual parties claim injuries — even if this occurs long after a regulatory decision — it is likely that we will see citizen suits also seek to revisit long-established regulations.

Changes to the Substance of Environmental Law

Recent dialogue about environmental issues has focused on the disconnect between current problems and the nearly 50-year-old toolkit of environmental statutes established to manage environmental issues.

Citizen suits are often pleaded in complaints containing, for instance, tort theories. Plaintiffs who may have formerly sued using statutory citizen suit provisions to remedy environmental issues are increasingly either combining citizen suit claims with other theories, or solely using historically nonenvironmental tools to remedy environmental problems.

While it is fairly straightforward to plead tort theories alleging harms to real estate in claims styled as citizen suits intended to address environmental harms, other efforts are more novel.

Environmental, Social and Governance Issues

ESG-related cases have been filed against plastics and petrochemical companies, businesses whose operations affect environmentally overburdened communities, and other industries with notable climate impacts using ESG-related terms like "greenwashing."

While these cases have frequently been filed by private parties or governmental entities pursuing environment-related goals, similar claims can sometimes be pursued for other reasons, such as the U.S. Securities and Exchange Commission's recent corporate disclosure-focused administrative

proceeding against Keurig related to single-use coffee pods.

Tort Theories

Tort theories are increasingly used to target the disposal of wastes traditionally regulated under the Resource Conservation and Recovery Act. The California attorney general's case against Exxon may serve as a model for litigation in this space.

Similar litigation has been filed against food and beverage companies alleging that single-use packaging has resulted in contaminated drinking water and harm to wildlife, and that companies need to warn consumers about risks posed by single-use packaging.

Environmental Justice

The Biden administration has placed environmental justice issues front and center of its policy agenda, in an effort to address perceived issues between wealthier communities where environmental issues are quickly addressed, and generally poorer communities where they are not.

Among other efforts, the federal government has prioritized capacity-building efforts, in which community groups are supported to better engage on issues. These groups are likely to use citizen suits and other tools to address issues perceived to exist in their communities.

While these novel efforts may not be successful, they demonstrate that opportunistic plaintiffs will seek to use tools like citizen suits, among others, to address perceived environmental issues — including waste from consumer products and packaging.

J. Michael Showalter and Bradley Rochlen are partners at ArentFox Schiff LLP.

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3M Can't Put Pause On Conn. Firefighters' PFAS Suit

By **Mike Curley**

Law360 (October 10, 2024, 6:53 PM EDT) -- A Connecticut federal judge on Thursday declined to let 3M Co. and other companies put a stay on a proposed class action by firefighters alleging their turnout gear contains so-called forever chemicals while the Judicial Panel on Multidistrict Litigation decides whether to roll it into a South Carolina MDL.

In his **order**, U.S. District Judge Alvin W. Thompson said the MDL primarily concerns per- and polyfluoroalkyl substances from aqueous film-forming foams, while the Connecticut firefighters' claims are primarily about their own gear, and while **the MDL** has expanded to include similar claims, waiting for the JPML could lead to discovery disputes that cause delays.

Judge Thompson said that because the claims for the firefighters are different than those in the bulk of the MDL, there's a serious question of how much discovery would overlap if it is consolidated in South Carolina, and the firefighters may need discovery separate from the MDL regardless.

And given the differences between this case and the typical cases in the MDL, the judge wrote that the opportunity to conduct discovery before consolidation would be beneficial to the parties if the case is consolidated in the MDL.

In the suit, **filed in June**, the firefighters allege their gear contains PFAS and are seeking an order requiring the companies to cease making protective gear containing the substances and contribute to the creation of a diagnostic medical testing program and medical monitoring protocol aimed at tracking their health and diagnosing any ailments resulting from PFAS exposure at an early stage.

3M **moved for a stay** in August while the JPML decides whether it belongs in the larger MDL, which has more than 10,000 cases concerning damages due to PFAS, saying it's still early in the case and discovery would not be disrupted.

3M said the stay is expected to be brief, with the JPML expected to render a final decision in December, but Judge Thompson said on Thursday that is not guaranteed, as the parties might dispute the panel's decision, extending the stay.

The judge added that in cases like this one there are often discovery disputes resulting in delays, and while no single delay should result in significant prejudice, cumulative ones could.

Denying the stay is also in the public interest, the judge wrote, given that the plaintiffs are firefighters performing a public service, so the public would want to see the claims resolved as quickly as possible.

In addition to 3M, the suit names as defendants DuPont de Nemours Inc. and its affiliates, Elevate Textiles Inc., Globe Manufacturing Co. LLC, W.L. Gore & Associates Inc., Fire-Dex GW LLC, Honeywell Safety Products USA Inc., Intertech Group Inc., Lion Group Inc., Milliken & Co., Morning Pride Manufacturing LLC, PBI Performance Products Inc., Safety Components Fabric Technologies Inc. and Stedfast USA Inc. The plaintiffs voluntarily dismissed claims against Gentex Corp in August.

Most of the other defendants have either joined in 3M's motion to stay or filed motions of their own, and Judge Thompson in a separate order on Thursday denied their motions as well.

Jennifer Sclar of Silver Golub & Teitell LLP, representing the firefighters, said her clients are pleased that the court denied the motion to stay.

"As plaintiffs have made clear to defendants, this action does not belong in a multidistrict litigation in South Carolina that is adjudicating liability claims for a completely different product," Sclar told Law360 on Thursday. "Defendants' motion practice is nothing more than an attempt to delay the much-needed relief that plaintiffs seek in this case. The court's decision will allow plaintiffs to move expeditiously to hold defendants accountable for the harm they have caused."

Representatives for the other parties could not immediately be reached for comment Thursday.

The firefighters are represented by Ian W. Sloss, Jennifer Sclar and Kate Sayed of Silver Golub & Teitell LLP.

3M is represented by Kevin M. Smith and James I. Glasser of Wiggin and Dana LLP.

Milliken is represented by Audra J. Inglis of Maron Marvel Bradley Anderson Tardy LLC.

The DuPont companies are represented by James D. Geisler of Shook Hardy & Bacon LLP.

Stedfast is represented by Aaron A. Fredericks of Hinshaw & Culbertson LLP.

Safety Components and Elevate Textiles are represented by John J. Robinson of Gordon Rees Scully Mansukhani LLP.

Globe and W.L. Gore are represented by Michael T. Ryan and Michael C. Barbarula of Ryan Ryan Deluca LLP.

Fire-Dex is represented by Christopher J. Lynch of Freeman Mathis & Gary LLP.

Honeywell and Morning Pride are represented by Leslie A. Cahill of Spears Manning & Martini LLC.

Intertech and PBI are represented by Michael T. McCormack of O'Sullivan McCormack Jensen & Bliss PC.

Lion Group is represented by Jennifer Elsyie Karr of Lewis Brisbois Bisgaard & Smith LLP.

The case is Uniformed Professional Fire Fighters Association of Connecticut et al. v. 3M Co. et al., case number 3:24-cv-01101, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Emily Field and Juan-Carlos Rodriguez. Editing by Brian Baresch.



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3M, Other Cos. Hit With PFAS Contamination Class Action

By **Isaac Monterose**

Law360 (October 10, 2024, 6:39 PM EDT) -- Nantucket, Massachusetts, residents seek to hold the 3M Co., The Chemours Co. and other companies liable for perfluoroalkyl and polyfluoroalkyl substances that allegedly contaminated their properties, their drinking water and the residents themselves.

In their proposed class action filed Sunday in Massachusetts federal court, the residents alleged that their island's groundwater was contaminated by PFAS, commonly called "forever chemicals" that are linked to cancer and other health complications. According to the residents, the groundwater contamination started when aqueous film-forming foam, which contains PFAS, was "used for firefighting training and response activities" at Nantucket Memorial Airport in the 1960s and the decades afterwards.

PFAS contamination was allegedly found in a private well near the airport in February 2020 and, in May 2020, more contaminated wells were found near the airport, the residents alleged. In the following years, additional contaminated wells were discovered.

According to the residents, the island's public water system was also contaminated with PFAS.

The residents also alleged that ACV Environmental caused an AFFF spill in December 2022 when the company was extracting the foam from trucks located at a fire station. The spill contaminated private wells on an area of the island known as Tom's Way and PFAS also contaminated the island's wastewater and a landfill, the residents claimed.

"By May 2024, the installation of the new water system was completed, and all wells on Tom's Way were decommissioned," the residents said.

The residents claimed that their proposed class could have thousands of members who reside on Nantucket. Their two classes include a "medical monitoring class" of Nantucket residents who ingested the allegedly contaminated water and an "economic damages class" of residents who own water wells allegedly contaminated by PFAS.

"The residents of Nantucket, and especially those who live near the firehouse and the airport, have come into contact with high levels of PFAS on a constant basis, causing substantially elevated health risks, as well as property damage and diminished property values," said class counsel Ian Sloss in a Monday statement.

The defendants didn't respond to requests for comment on Thursday.

The proposed class is represented by Sean K. McElligott, Ian W. Sloss, Johnathan Seredynski, Krystyna D. Gancoss and Kate Sayed of Silver Golub & Teitell LLP.

Counsel information for the defendants wasn't immediately available.

The case is Ruley et al v. The 3M Company et al, case number 1:24-cv-12564, in the U.S. District Court for the District of Massachusetts.

--Editing by Alex Hubbard.



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4 Key Details From TD's Historic \$3.1B Money Laundering Deal

By **Jon Hill**

Law360 (October 10, 2024, 11:47 PM EDT) -- U.S. authorities have levied some of the biggest, most serious penalties of their kind against TD Bank as part of a mammoth \$3.1 billion anti-money laundering settlement announced Thursday. Here's a closer look at how the Canadian bank got here.

At a Washington, D.C., press conference, officials from the U.S. Department of Justice and U.S. Treasury Department unveiled the **terms of the deal**, which concludes parallel criminal and civil investigations into TD Bank's compliance with U.S. laws intended to combat illicit financial activity.

The terms call for TD Bank to plead guilty to federal money laundering-related charges and pay more than \$3 billion in penalties to various federal authorities, including the Justice Department and its banking regulators. The bank has also agreed to have its growth capped in the U.S. while it remedies what officials called its "systemic failures" to adequately guard against financial crime.

Those failures have been laid out in a 47-page court document that the Justice Department filed Thursday in New Jersey federal court. Here, Law360 offers a glimpse at some of the highlights.

A Broken Culture Of Compliance

Federal prosecutors said Thursday that even as TD Bank grew in size, complexity and profitability, it kept its spending on U.S. anti-money laundering compliance effectively flat over a period of years.

Bank leaders enforced a "flat cost paradigm" in which internal budgets weren't supposed to go up, and they resisted instituting proper guardrails against illicit financial activity out of concerns that it might impair the "customer experience," according to the Justice Department's court filings.

Consequently, TD Bank's systems for catching potentially illicit transactions were not kept up-to-date, the bank didn't provide its front-line employees with adequate compliance training and other weaknesses in its anti-money laundering program went unaddressed, the government said.

Prosecutors said these problems persisted despite "repeated warnings." TD employees also knew its anti-money laundering program wasn't up to snuff — Thursday's court filings included excerpts from chat messages in which staff joked about the bank being an "easy target" for dirty money while riffing on TD's U.S. motto, "America's Most Convenient Bank."

"why all the really awful ones bank here lol," one employee is quoted as asking another.

"because..." the second employee responded, "we are convenient"

"bahahahahaha," the first answered. "that was their worst move evvvver"

\$18 Trillion In Unmonitored Transactions

Prioritizing convenience and cost-savings over compliance proved disastrous for TD Bank: its "persistent, pervasive and known" deficiencies enabled, among other things, three money-laundering networks to funnel more than \$600 million through the bank between 2019 and 2023, according to the government.

Even more shockingly, Thursday's court filings said that TD Bank failed to monitor roughly \$18.3 trillion in transactions that it processed between January 2018 and April 2024, a whopping oversight that prosecutors attributed to certain gaps in its rickety, outdated automatic transaction monitoring system.

The bank had so strictly limited which types of activity got screened by the system that it was not monitoring 92% of its transaction volume during this period, missing about 14.6 billion transactions in the process, the Justice Department said.

At the same time, the government said TD Bank was also rolling out new products and services without updating corresponding systems to account for their associated anti-money laundering risks.

Access to mobile payment service Zelle, in particular, was introduced for TD Bank customers in April 2017, but the bank failed to screen any Zelle activity through its transaction monitoring system for the next nearly three years, the Justice Department said.

And when it did start incorporating Zelle into the monitoring system, the bank didn't tune its screening filters accordingly. Instead, the filters were left set up in a way that meant they "captured activity that effectively could not occur through Zelle," Thursday's court filings said.

"During the relevant period, [TD Bank NA] individual customers transferred over \$75 billion in Zelle transactions, which was almost entirely unmonitored," the government said.

An Inside Job

In announcing Thursday's settlements, a U.S. Treasury Department official stressed that TD Bank's anti-money laundering failures led to "actual, material harm," not just "hypothetical vulnerabilities."

In particular, the bank is alleged to have gotten caught up in a vast money-laundering network that was moving illicit cash for fentanyl and other drug traffickers. Between 2018 and 2021, the bank facilitated more than \$400 million in transactions for this network through branches in New York, New Jersey and elsewhere, according to court filings.

Prosecutors said this network was run by an individual known as "David," who pled guilty in 2022 to related charges. While engaging in obviously suspicious transactions — at one point, a TD store manager reportedly emailed a colleague, "You guys really need to shut this down LOL" — David handed out \$57,000 in gift-card bribes to curry favor with TD employees, the government said in court filings.

TD Bank employees are also alleged to have helped a different money-laundering network exploit the bank's weaknesses. The Justice Department said five "store insiders" opened accounts, supplied ATM cards and circumvented controls on behalf of the network, allowing it to launder \$39 million of drug and other money through the bank to Colombia.

TD's Powerhouse Legal Team

TD Bank, one of Canada's "Big Five" banks, had top-tier legal representation in reaching Thursday's blockbuster corporate criminal resolution.

Notably, its team included a former head of the Justice Department itself — Loretta Lynch, who served as U.S. attorney general toward the end of the Obama administration and is now a partner at Paul Weiss Rifkind Wharton & Garrison LLP.

Aisling O'Shea and Nicolas Bourtin, two prominent Sullivan & Cromwell LLP partners, were also part of TD Bank's legal team. The pair are co-heads of the firm's Foreign Corrupt Practices Act and anti-corruption group, and Bourtin is the managing partner of its criminal defense and investigations group.

Since leaving government, Lynch has helped major corporate and institutional clients navigate what her firm biography page describes as "sensitive investigations and reputation-threatening litigation and regulatory enforcement matters," specializing particularly in discrimination and harassment

issues.

Lynch has led reviews into claims of workplace harassment at BlackRock and **hazing** in Northwestern University's athletics program, for example, and she has defended McDonald's in several racial discrimination **lawsuits**. Lynch also defended the National Football League in a high-profile discrimination suit **settled earlier this week**.

O'Shea, meanwhile, has guided a slew of big-name companies, including banks, in white-collar and regulatory enforcement matters. Among her greatest hits, she represented Fiat Chrysler in a **\$300 million resolution** of a Justice Department emissions fraud investigation in 2022, and she helped steer Bank Hapoalim, Israel's largest bank, to an **\$874 million settlement** of a U.S. tax evasion probe in 2020.

Bourtin, a former federal prosecutor, also has a distinguished record in handling significant white-collar defense and investigations matters for major banks and other corporate clients. In 2020, he helped Wells Fargo reach a **\$3 billion settlement** resolving multiple U.S. investigations stemming from its so-called fake accounts scandal; later that same year, he represented Goldman Sachs in a **\$2.9 billion global resolution** over its role in the 1MDB foreign bribery scandal.

--Editing by Michael Watanabe.

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Eli Lilly Tells Mich. Justices It's 'Wrong Time' For Insulin Case

By **Carolyn Muyskens**

Law360 (October 10, 2024, 7:22 PM EDT) -- A lawyer for pharmaceutical company Eli Lilly has urged the Michigan Supreme Court to reject a call to shake up the state's consumer protection precedent, saying during oral arguments Thursday that the attorney general is asking the court to do "by fiat" what Michigan lawmakers could soon accomplish with a bill package that got a hearing earlier this week.

Attorney General Dana Nessel has sought the Michigan Supreme Court's intervention in her quest to investigate Lilly for allegedly charging excessive prices for insulin after her request for subpoenas was blocked by a safe-harbor provision that exempts regulated transactions — like the sale of insulin — from the Michigan Consumer Protection Act.

Nessel contends the safe-harbor provision has been interpreted too broadly by the court and has become a "gaping hole" that shields all businesses that are subject to some kind of regulatory authority, such as occupational licensing, from the law.

But Lilly counsel John O'Quinn of Kirkland & Ellis LLP told the justices this is the "wrong case at the wrong time" to change how the MCPA is interpreted, given the Michigan Legislature is currently considering bills that would narrow the scope of the exact safe-harbor provision at issue in the attorney general's case.

SB 1021, introduced Oct. 2 by Sen. Sam Singh, D-East Lansing, was taken up by a Senate committee on Wednesday along with a companion bill, SB 1022. Nessel testified in support of the bills.

"This court should not short-circuit the ongoing legislative process, particularly in the context of the case that is not actually about consumer protection at all. It is just about overturning precedent," O'Quinn told the justices. "To be clear, the attorney general has not identified a single patient that cannot access Lilly's insulin for less than \$35 a month and has rebuffed every request from Lilly to engage on this so that if there were any gaps in Lilly's insulin affordability program, Lilly could fill them."

Nessel has asked the state's high court to overturn two of its past decisions addressing the exemption, 1999's *Smith v. Globe Life Insurance Co.* and 2007's *Liss v. Lewiston-Richards Inc.*

Kicking off the questioning Thursday, Justice Megan K. Cavanagh asked the Department of Attorney General's Darrin F. Fowler, who argued on behalf of Nessel, to address one of the factors the court must consider in overturning precedent.

"Even if we were to agree with you that Smith and Liss were incorrectly decided, what do we do with the fact that for 25 years, everybody in Michigan has been relying on them?" Justice Cavanagh asked.

Fowler said if a business is relying on the court rulings to get away with "a business model of lying and gouging and deceiving," it shouldn't be allowed to continue doing that.

The justices should also consider consumers' expectation that Michigan's consumer protection law will protect them if they are cheated by a business, Fowler said.

Fowler fielded a barrage of questions from Justice David F. Viviano about the meaning of the word "transaction" in the safe-harbor provision and how it would work under the AG's proposed interpretation. The MCPA says it does not apply to "transaction[s] or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

"If we accept your interpretation of the statute, which as I understand it is that every aspect of the transaction has to be approved by a regulatory authority, including all of the terms of the transaction, and including the most important one, the price term, what would the exemption apply to going forward?" Justice Viviano asked Fowler.

Fowler took issue with the justice's description of the attorney general's position.

"Our argument is not that every aspect of the transaction has to be articulated in the regulatory scheme. The argument is that the appropriate focus in each individual case is the specific aspect that is being alleged as unlawful. When we talk about Eli Lilly, we're not alleging that Eli Lilly is wrong to sell insulin writ large. The allegation is that Eli Lilly is charging a grossly excessive price by charging — for example, \$570 for a pack of 10 KwikPens," Fowler said.

Justice Viviano pressed Fowler again with several more questions about the role of the word transaction in the statute, saying he was "trying to wrap [his] mind around" how the attorney general reads the language.

"All I can come up with is that you do not believe that the statute exempts a transaction unless the entire transaction, and every bit of it, is approved by a regulatory authority," the justice said. The justice suggested this interpretation would write the word "transaction" out of the statute.

Fowler disagreed with Justice Viviano's characterization again. As an example, Fowler said if Michigan's state housing agency signed off on a lease agreement "between John Smith and a landlord," that particular transaction would be "specifically authorized" by the state, and Smith couldn't then sue his landlord under the MCPA.

Paul F. Novak of Weitz & Luxenberg PC, representing the Michigan Association for Justice, which appeared as an amicus curiae in the case, also drew questions about his argument that the proper inquiry, when deciding if the exemption applies, is whether the specific conduct alleged to be unfair or deceptive was authorized by the government.

Justice Elizabeth M. Welch asked Novak if he believed the word "transaction" encompasses more than "just the single act of selling the drug."

"I'm trying to get to Justice Viviano's concerns. How do we parse out the start and end of the transaction?" the justice asked.

Novak said the court must look at what specific conduct is alleged to be unlawful under the MCPA and ask, "Has that been specifically authorized?"

"I take your position to be even more narrow" than the attorney general's, Justice Viviano told Novak. "What's left of the word 'transactions' in the statute, if we accept your interpretation?"

Novak replied that only "those components of the transaction that have been specifically authorized are exempt" from the law.

Novak cited the U.S. Department of Justice's criminal prosecution of a drug company for deceptively marketing opioids as crush-resistant. Lilly's interpretation of the exemption would shield the drug company's illegal marketing activities from the MCPA because of the opioids' FDA approval, "which is absurd," he argued.

During O'Quinn's turn at the podium, Chief Justice Elizabeth T. Clement asked the lawyer for Lilly to address the issue of illegal conduct potentially being exempt from the Michigan Consumer Protection Act.

"There are other laws that can address that," O'Quinn said. "An exemption under the Michigan Consumer Protection Act doesn't exempt a transaction under the occupational code, under the construction code, the vehicle code, tort law, that law of contracts, federal law."

For example, if companies were engaged in price-fixing, prosecutors could go after them for violating antitrust laws, O'Quinn said.

Justice Clement asked O'Quinn "how specific" does specific authorization need to be to shield a business from the MCPA.

Lilly's attorney said he wasn't arguing that "a mere license to do business in the state" would shield all of a business's activities from scrutiny.

"Our modest point is that you simply need specific authorization to engage in a type of transaction," O'Quinn said. "And that is the way that the case law has been applied."

The attorney general launched her investigation in 2022 after allegedly finding Michigan customers were being charged 855% more to purchase the insulin medication Humalog than people in Canada.

Following the arguments, Nessel said in a statement that the Smith and Liss decisions' interpretation of the law has left her office often "powerless to use the Michigan Consumer Protection Act to investigate or hold accountable deceptive business agents if they are shielded by professional or occupational licenses."

"Reversing these decisions would not only enable us to investigate allegations of insulin price-gouging, but also restore the MCPA's power to protect Michigan consumers across the marketplace," Nessel said.

The government is represented by Darrin F. Fowler, Michael S. Hill and Carl J. Hammaker of the Michigan Attorney General's Office.

Eli Lilly is represented by Matthew Schneider and Kenneth T. Brooks of Honigman LLP and Andrew A. Kassof, Diana M. Watral, John C. O'Quinn and Matt Owen of Kirkland & Ellis LLP.

The Michigan Association for Justice is represented by Paul F. Novak of Weitz & Luxenberg PC.

The case is Attorney General v. Eli Lilly, case number 165961, in the Michigan Supreme Court.

--Additional reporting by Gianna Ferrarin. Editing by Philip Shea.



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Ex-Latham Atty Must Turn Over SEC Whistleblower Docs

By **Jessica Corso**

Law360 (October 10, 2024, 8:50 PM EDT) -- A New Jersey federal judge on Thursday ordered a retired Latham & Watkins LLP attorney to hand over communications between himself and two whistleblowers who tipped off the U.S. Securities and Exchange Commission to an alleged \$73 million fraud after one of the whistleblowers dropped his objections to producing the documents.

U.S. Magistrate Judge J. Brendan Day signed off on a request by credit reporting agency MicroBilt Corp. and its co-defendants that former Latham attorney Lawrence West produce communications between himself and whistleblowers Robert Farrell and Robert Szostak.

West was hired by Farrell and Szostak after he left Latham to help bring their claims of wrongdoing at Microbilt to the SEC, according to court documents. The SEC **sued the company** in 2021 alleging that it misled investors while raising \$73 million for a now-bankrupt fund.

In defending itself against the accusations, Microbilt subpoenaed West for documents concerning his communications with Farrell and Szostak, but **Szostak objected**, citing attorney-client privilege.

He dropped that objection on Tuesday, however, with his attorney, Darren M. Baldo, telling the court that "Mr. Szostak had (previously unbeknownst to me, and Mr. Szostak did not recall) forwarded certain email communications between him and West (otherwise likely privileged) to other parties not within any protectable contact sphere."

Farrell also wrote to the court this week, saying he didn't object to the documents' production. He didn't immediately respond to a request for comment Thursday.

West, who hasn't filed an appearance in the case, and counsel for Szostak didn't immediately respond to requests for comment Thursday.

The SEC is represented in-house by James Smith and Davis Oliver.

Szostak is represented by Darren M. Baldo.

Farrell represents himself.

The defendants are represented by Gerald Krovatin of Krovatin Nau LLC and Zach Intrater of Agnifilo Intrater LLP.

The case is Securities and Exchange Commission v. Princeton Alternative Funding LLC et al., case number 3:21-cv-12971, in the U.S. District Court for the District of New Jersey.

--Editing by Brian Baresch.

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Norfolk Southern Says Tank Car Cos. Should Help Pay \$600M Deal

By Linda Chiem

Law360 (October 10, 2024, 7:06 PM EDT) -- Norfolk Southern and tank car companies sparred in Ohio federal court over key questions of liability related to the February 2023 East Palestine derailment and toxic chemical spill, as the rail giant seeks to offload at least some damages, including a recent \$600 million settlement to affected residents and businesses.

Norfolk Southern Corp. on Wednesday filed partial summary judgment motions claiming negligent actions by OxyVinyls LP and GATX Corp. and its subsidiary General American Marks Co. proximately caused the derailment itself or the controversial controlled vent and burn of highly flammable vinyl chloride during the derailment's **chaotic aftermath**.

The Atlanta-based rail giant lobbed **third-party claims** against the tank car companies, saying they must shoulder least some of the **\$600 million settlement** it agreed to pay residents, property owners, employees and businesses. U.S. District Judge Benita Y. Pearson, who is overseeing **consolidated litigation** resulting from the fiery Feb. 3, 2023, derailment, recently granted **final approval** to the deal.

There were five tank cars containing OxyVinyls' vinyl chloride — a toxic, colorless and flammable chemical used to make a variety of hard plastics — that were among the 38 cars that derailed that day. OxyVinyls owned three of the cars, GATX owned one, and another company, Trinity Industries Leasing Co., owned another car.

Norfolk Southern **claims** OxyVinyls gave first responders "inconsistent information" about what might've been occurring inside the vinyl chloride tank cars. The derailed cars were sitting in pool fires for hours and there were indications that unrelieved pressure was building inside them, which could trigger a chemical process known as polymerization that would then spark a devastating explosion, according to Norfolk Southern.

That's why Norfolk Southern and its contractors recommending conducting the vent and burn to on-the-ground emergency responders, known as the unified command. But that decision has been lambasted, with the National Transportation Safety Board determining in June that the vent and burn was **"unnecessary."**

"Indeed, OxyVinyls — the purported expert in the chemical product at the center of the emergency response — directed its employees not to participate in any decision-making about how to address the emergency response and to make no recommendations about any approach," Norfolk Southern argued. "Worse than that, OxyVinyls provided critical emergency response information that has since proved to be flatly wrong. In its 'safety data sheet' or 'SDS' — a federally required form meant to convey reliable and up-to-date information about the dangers that chemicals pose in the event of a disaster — OxyVinyls expressly and repeatedly warned of the danger that heat could make the vinyl chloride polymerize."

But OxyVinyls has maintained that the pressure-relief devices on the tank car were functioning as intended, and that polymerization was not occurring.

OxyVinyls filed its own **summary judgment bid** Wednesday, slamming Norfolk Southern's attempt at shifting blame as seeking "derivative damages dependent upon how much it has agreed to pay to the class plaintiffs in settlement" and indicative of the railroad's inability to calculate or apportion

damages specific to OxyVinyls.

"In other words, Norfolk Southern, on this record, could do no more than ask a jury to engage in rank speculation, which is improper," it said.

Ultimately, Norfolk Southern and its contractors made the vent-and-burn decision "irrespective of OxyVinyls' documentation and irrespective of polymerization," OxyVinyls said.

Norfolk Southern is also **going after GATX**, arguing that it is "indisputable" that the derailment was set off by the failure of an **overheated roller bearing** on Car No. 23, a so-called hopper car owned by GATX's General American Marks Corp. that was leased to a customer, Braskem America Inc., which was transporting plastic pellets. The railroad accuses GATX of failing to exercise ordinary care in maintaining and inspecting the roller bearings on Car No. 23, which Norfolk Southern contends was exposed to extreme weather and water damage during 2017's Hurricane Harvey when it was parked in a rail yard.

GATX also owned Car No. 29, which was leased to OxyVinyls and transporting vinyl chloride. Norfolk Southern has argued that Car No. 29 "had never been approved for vinyl chloride service and had other unapproved tank car modifications that were incompatible with vinyl chloride service." It also accused GATX and its subsidiary of poor maintenance and of modifying valves and fittings on the tank cars.

In its own **summary judgment motion** Wednesday, GATX said neither Car No. 23 nor any of its components were ever partially or totally submerged during Hurricane Harvey — nearly five years before the East Palestine derailment — and that Car No. 29 fully complied with federal safety standards.

"The record is thus clear that GATX applied a thorough inspection, repair, and maintenance procedure that aligns with, and even exceeds, industry practice. While not conclusive, compliance with industry practice serves as evidence that GATX satisfied any duty of due care," it said. "Norfolk Southern, meanwhile, has no testimony or other evidence that even suggests that GATX's maintenance of [Car No. 29] deviated from industry practice or any applicable statutory and regulatory regime, or was in any other way deficient."

Representatives for the parties were not available for comment Thursday.

Norfolk Southern is represented by Alan Schoenfeld, Andrew Rhys Davies, Davina Pujari, Christopher Rheinheimer and Albinas Prizgintas of WilmerHale, and J. Lawson Johnston, Scott D. Clements, Aaron Ponzo and Paul Roman of Dickie McCamey & Chilcote PC.

OxyVinyls is represented by Kimberly Weber Herlihy and Alycia N. Broz of Vorys Sater Seymour and Pease LLP.

GATX and General American Marks are represented by Hariklia Karis, Robert B. Ellis, Steven J. Lindsay, Jonathan O. Emmanuel, Aaron Stevenson and Sydne K. Collier of Kirkland & Ellis LLP, and Joseph A. Castrodale and Meggan A. Loudon of Benesch Friedlander Coplan & Aronoff LLP.

The case is In re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

--Editing by Adam LoBelia.



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Oregon Gas Customers Sue Over 'Greenwashing' Program

By **Madeline Lyskawa**

Law360 (October 10, 2024, 8:27 PM EDT) -- Northwest Natural Gas Co. has been accused by customers of engaging in "greenwashing" by advertising its Smart Energy program as a way for them to offset their natural gas emissions, while directing the program's funds to methane-generating industrial dairy farms.

In a proposed class complaint filed on Wednesday, Northwest Natural Gas Co. customers Nicolas Blumm and Claire Gates told an Oregon state court that they were enticed into enrolling in the company's Smart Energy program as a result of its deceptive marketing, which led them to believe they would be mitigating their household's carbon footprint.

In reality, however, the fees they paid went to support "manure digesters at factory dairies like Boardman, Oregon's Threemile Canyon Farms, where over 61,000 cows produce between 9 and 16 million pounds of methane per year," the customers and their attorneys said in a Thursday press release.

This factory farm system that Northwest Natural has tricked its customers to buy into "is entrenching both industrial agriculture and fossil fuel infrastructure," Kelsey Eberly of FarmSTAND, an attorney representing the customers, said in the same press release.

"These factory dairies also pollute their neighbors' air and water, are driving small dairy producers out of business at an alarming rate, and are the perfect environment for the spread of diseases like bird flu," Eberly added.

Blumm and Gates are represented by David F. Sugerman and Nadia H. Dahab of Sugerman Dahab and Kelsey R. Eberly and Skye M. Walker of FarmSTAND.

Counsel information for Northwest Natural Gas Co. and Northwest Natural Holding Co. was not immediately available.

The case is Nicolas Blumm et al. v. Northwest Natural Gas Company et al., case number 24CV48490, in the Circuit Court for Multnomah County, Oregon.

--Editing by Emily Kokoll.

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